



**The protection and promotion of the rights of street children:
A South African perspective**

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Mini-dissertation accepted in partial fulfilment of the requirements for the degree *Master of Law in International Child Law* at the North-West University

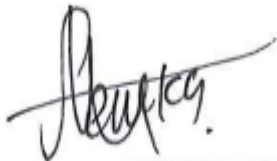
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SOLEMN DECLARATION

I, **Fortunate Seneka Mongwai** student number **27683757**, declare herewith that the mini-dissertation titled "**The protection and promotion of the rights of street children: A South African perspective**", which I herewith submit to the North West University (Potchefstroom Campus) is in partial fulfilment with the requirements set for the degree ***Masters of Law (LLM)*** in **International Child Law**. I further declare that this mini-dissertation is my own original work and has not already been submitted by me at this university or any other university.



Date: 6 December 2021

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Firstly, I would like to thank God - even in times where I felt like giving up you heard my prayers and gave me the strength and will power to keep going.

To my dearest mother, Moloko Mongwai, thank you for your love and support. I am grateful to have been blessed with a wonderful mother like you who support me in everything that I do. All your prayers and sacrifices have pushed me to work hard to be where I am today. Kea leboga Mokgalaka!

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DEDICATION

This dissertation is dedicated to all the children in the street situation in South Africa. I hope and pray that your voices will be heard one day and we will live in a world where no child has to experience the traumatic experiences of living or being on the streets.

"Now when the world is so confused and its problems so complicated, I feel we need our children more than ever. Their natural wisdom points the way to solutions that lie, waiting to be recognised, within our own hearts" - MJ

ABSTRACT

The existence of the plight of street children is a clear violation of children's human rights. Children across the world find themselves on the street for various reasons. Specifically, in South Africa, the main push and pull factors that contribute to children winding up on the streets include economic poverty; high unemployment rate; HIV and AIDS; abuse; neglect; and familial breakdown, to name but a few. Street children represent a vulnerable group of children or those in the most difficult circumstances in need of care and protection. Once on the street, these children become victims of violence and abuse due to the nature of street life. They are deprived of a healthy childhood as being on the street means that they spend most of their young lives trying to survive and taking care of themselves — this should be the responsibility of their parents and family. Hence, they do not have the time for leisure and to be children. The violence and abuse suffered on the streets are a violation of these children's rights, exemplifying the government's failure to guarantee and protect these children from further harm.

Difficulties in establishing a universal definition of who street children are, have somehow created confusion for the State, which often leads to street children not being included in policy conceptualisation and their needs going unmet. This has also led to the stigma regarding street children as they are misunderstood and mistreated or discriminated against by society. Notably, the needs and circumstances of these children must be understood to ensure a positive response by the government and society as a whole. These are the future leaders and need to be nurtured to become better citizens without having to live the traumatic experiences of being unprotected and vulnerable on the streets.

Most of these children who find themselves in the street situation have either lost their parents or have lost connection with their families. Once on the streets, they are the responsibility of the State, and State has certain obligations to ensure that the rights of these children are protected, promoted, and fulfilled. This has been done through ratifying international treaties applicable to all children, including

street children, such as the United Nations (UN) Convention on the Rights of the Child; regional law, such as the African Charter on the Rights and Welfare of the Child; national laws, such the *Constitution of the Republic of South Africa*, 1996 and the *Children's Act* 38 of 2005; and policies, such as White Paper for Social Welfare services (1997) and National Child Care and Protection Policy (2019). These legal frameworks are, however, not clear on addressing the needs of street children and at times do not guarantee these children the same protection as other children.

This dissertation explores the plight of street children, the existing legal frameworks, and whether they adequately protect the rights of street children, as well as the extent of the State's obligation regarding the rights of street children.

Keywords: Street children; children's rights; vulnerable children; street child phenomenon; Children of the street; South Africa

OPSOMMING

Die benarde toestand van straatkinders beklemtoon die duidelike oortreding van hul menseregte. Kinders van regoor die wêreld bevind hulself op straat vir verskeie redes. In Suid-Afrika is die hoof "druk" en "trek" faktore wat bydra tot kinders op straat die volgende: ekonomiese armoede; hoë werkloosheid; HIV en VIGS; misbruik of mishandeling; verwaarlosing; en familiale ineenstorting. Straatkinders verteenwoordig 'n kwesbare groep kinders — anders gestel, die kinders in die moeilikste omstandighede wat sorg en beskerming benodig.

Straatkinders is dikwels die slagoffers van geweld, misbruik en mishandeling as gevolg van die straat-leefwyse. Straatkinders word ontnem van hul kinderjare, want om op straat te wees beteken dat hulle meeste van hul kinderjare veg om oorlewing — dit is veronderstel om die verantwoordelikheid van die ouers en familie te wees. Dit beteken dat straatkinders nie die voorreg het om te ontspan en net kinders te wees nie. Die oortreding van kinderregte en die geweld op straat beklemtoon die regering se mislukking om die kinders te beskerm. Daar bestaan nie 'n universele definisie van "straatkinders" nie en hierdie lewer 'n bydrae tot verwarring (vir spesifiek beleidmakers). As gevolg van die verwarring word straatkinders uitgesluit by beleidskonseptualisering wat verder bydra tot hul onbevredigde behoeftes. Hierdie lei ook tot stigma rakende straatkinders — hulle is dikwels die slagoffers van mishandeling en diskriminasie vanaf die samelewing. Dit is belangrik dat die behoeftes en omstandighede van hierdie kinders verstaan moet word sodat 'n positiewe reaksie en benadering gekweek kan word. Hierdie kinders is die toekomstige leiers. Hulle moet gekoester word om beter toekomstige burgers te wees, sonder om verder die traumatiese ervaringe van straatlewe te ervaar.

Meeste straatkinders is dikwels die gevolg van oorlede ouers of hul het kontak met hul families verloor. Straatkinders is die verantwoordelikheid van die Staat en die Staat het sekere verpligtinge wat hul moet nakom om te verseker dat die regte van die kinders beskerm, bevorder en vervul word. Verskeie internasionale verdrae (soos die Verenigde Nasies (VN) se *Konvensie oor die Regte van die Kind*; VN *Riglyne vir Alternatiewe Versorging van Kinders*; streeksreg soos die *Afrika-handves*; nasionale wette soos die 1996 *Grondwet*, die *Kinderwet*; en beleid soos die 1997 Witskrif vir

Maatskaplike Welsynsdienste, en die 2019 Nasionale Kindersorg- en Beskermingsbeleid) beoog om alle kinders te beskerm, insluitende straatkinders. Hierdie raamwerke is egter onduidelike en spreek nie die behoeftes van straatkinders direk aan nie. Die beskerming van straatkinders word nie dieselfde gewaarborg en beskerm as die van ander kinders nie.

Hierdie navorsing beoog om die benarde situasie van straatkinders en die bestaande wetlike raamwerke te ondersoek met die doel om vas te stel of die regte van straatkinders genoegsaam beskerm word. Die verpligtinge en verantwoordelikhede van die Staat word ook ondersoek met betrekking tot die regte en beskerming van straatkinders.

Trefwoorde: Straatkinders; Kinderregte; Weerlose kinders; Straakkind verskynsels; Suid-Afrika

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LIST OF ABBREVIATIONS

ABS	American Behavioural Sciences
AESS	Asian Economic and Social Society
AIPM	Annals of Ibadan Postgraduate Medicine
CCW	Child Care Worker
CDR	Child Development Research
CEACR	Committee of Experts on the Application of Conventions and Recommendations
CFSWJ	Child & Family Social Work Journal
CEJIL	Centre for Justice and International Law
CPS	Child Protection Services
CRC	The United Nations Convention on the Rights of the Child
CYCC	Child and Youth Care Centre
DSD	Department of Social Development
DSW	Designated Social Worker
FLR	Fordham Law Review
HRLR	Human Rights Law Review
JCHSA	Journal of Comprehensive Health in South Africa
JCIE	Journal of Contemporary Issues in Education
IACHR	Inter-American Convention on Human Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
IJELLH	International Journal of English, Language, Literature and Humanities
IJHSS	International Journal of Humanities and Social Science

ILO	International Labour Organisations
LGBTI	Lesbian Gay Bisexual Transgender Intersex
LGBTQIA	Lesbian Gay Bisexual Transgender Queer Intersex Asexual
NGO	Non-Governmental Organisation
NPO	Non-Profit Organisation
OPAC	Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict
OPIC	Optional Protocol to the Convention of the Rights of the Child on Communication Procedure
OPSC	Optional Protocol to the Convention of the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography
PELJ	Potchefstroom Electronic Law Journal
SAJE	South African Journal of Education
SALJ	South African Law Journal
SAOT	South African Occupational Therapy
SAPS	South African Police Services
SA Tech PTA	South African Technicon Pretoria
STELL LR	Stellenbosch Law Review
TQR	The Quantitative Report
UB	Urban Studies
UDHR	The Universal Declaration of Human Rights
UNICEF	United Nations International Children's Emergency Fund
WHO	World Health Organization

1 INTRODUCTION

1.1 Introduction and problem statement

The United Nations International Children's Emergency Fund (UNICEF) defines the term "street children" as

any girl or boy for whom the street (in the widest sense of the word, including unoccupied dwelling, wasteland, etc.) has become his or her habitual abode and/or source of livelihood; and who is inadequately protected, supervised or directed by responsible adults.¹

According to Grundling, de Jager and de Fourie, children living and working on the street are a heterogeneous population that can be categorised into three main groups, which are (1) children of the street; (2) children on the street; and (3) a part of the street family:

- (i) Children of the street – the street is the main living place for these children. They might have family ties, but they are considered as not belonging to the mainstream youth. Children of the street are children who permanently live on the street.
- (ii) Children on the street – these children work on the street to supplement income and then they will return home at night unlike children of the street who live permanently on the street.
- (iii) A part of the street family – these include children that live on the street with the rest of their families. They move their possessions from one place to another when necessary.²

There are estimated to be around 150 million children living and working on the streets across the world, however the numbers might be higher than this as there are no clear statistics by the government or social department.³ According to the United Nations as cited by Hixhiymeri and Hazizaj, the age of children living and working on the street range from 3 to 18 years.⁴ Of these children, 40% are homeless whereas the remaining 60% work on the streets to provide food for their

¹ Glasser *Homeless in a Global Perspective* 54; Sanji *Resilience and the Re-integration of Street Children and Youth in Sub-Saharan Africa: The case of Cameroon* 4.

² Grundling, de Jager and de Fourie 2004 *SA Tech PTA* 97.

³ Grundling, de Jager and de Fourie 2004 *SA Tech PTA* 97.

⁴ Haxhiymeri and Hazizaj 2011 *Save the Children* 10.

families.⁵ These children are increasingly becoming the victims of brutal violence, sexual exploitation, neglect, substance dependence, and human rights abuses.⁶ In South Africa, available estimates date from the mid-1990s (1996-1999) where between 9 000 and 10 000 children were estimated to be living on the streets.⁷ Currently, the estimated number hovers around 250 000 children, which is a remarkable increase.⁸

Social imbalances and impoverishment are the most prominent features of contemporary societies.⁹ The presence of an extensive number of children living and working on the street in unsupervised and unprotected situations, also known as "street children", provides a definitive example of this phenomenon.¹⁰ Street children are recognised as children who migrate to the street as a result of poverty and lack of parental care.¹¹ There is growing literature that recognises the difficult situation of street children, with most of these literature having been conducted in the area of international law.¹²

A South African study conducted by Mafokane describes street children as resourceful social agents.¹³ Other studies found that street children are resilient and can therefore adapt to difficult situations.¹⁴ Some scholars identify street children as children who need emotional and social support.¹⁵ Therefore, the studies show the different lenses used in exploring and deconstructing the concept of street children.

In a review of literature on children living on the streets, Le Roux and Smith found that street children are usually malnourished and they live in constant fear of people,

⁵ Haxhiymeri and Hazizaj 2011 *Save the Children* 10.

⁶ Van Jaarsveld, Vermaak and van Royeen 2011 *SAJOT* 1.

⁷ Van Jaarsveld, Vermaak and van Royeen 2011 *SAJOT* 1. See also Le Roux 1996 *Adolescence* 423; Van Blerk 2012 *US* 557; Ward and Seager 2010 *Development Southern Africa* 86.

⁸ Maepa 2021 *Front Public Health* 5.

⁹ Wandimu and Laha 2016 *CDR* 1; Nasir and Siddiqui 2012 *AESS* 509.

¹⁰ Wandimu and Laha 2016 *CRD* 1.

¹¹ Owoaje, Adebisi and Asuzu 2009 *AIPM* 10.

¹² Aptekar and Stoecklin *Street Children and Homeless Youth: A Cross-Cultural Perspective* 8, Lucchini and Stoecklin *Children in Street Situations: A Concept in Search of an Object* 14; Dladla and Ogina 2018 *SAJE* 1.

¹³ Mafokane 2014 *Social Worker* 134.

¹⁴ Ayuku *et al* 2004 *AHS* 24.

¹⁵ Karabanow 2008 *ABS* 772. See also John *et al* 2019 *Psychology* 677.

such as police, and of being arrested.¹⁶ They suffer from harm and are not afforded the priority given to other children.¹⁷ They are socially neglected and disregarded by society.¹⁸ They are also distraught of adults and authority and thus frequently suffer from low self-esteem.¹⁹ Street children are often excluded and deprived of their basic needs and rights; they have limited access to health care, justice, identity documents, education, employment, opportunities, protection, and security.²⁰ This leads to them being discarded and discriminated against as they are not treated like other children (who are living in better circumstances)²¹.

Children living and working on the streets are vulnerable as they are amongst the most deprived and marginalised not only in South Africa but globally.²² They can therefore be seen as a subcategory of what UNICEF identifies as "children in especially difficult circumstances".²³ These children have particular psychological, emotional, and economic needs that require special interventions distinct from those used for other children (less vulnerable) in need of care.²⁴ However, to this end programmes that focus on street children's immediate basic and pressing needs, such as the provision of food and basic health care, can be criticised for their failure to (i) address factors that impel children to the street, and (ii) equip children with necessary skills to leave the streets.²⁵

From the welfare approach of children's rights, which is often adopted by governmental organisations, it is clear that the approach can be criticised for

¹⁶ Le Roux and Smith 1998 *Adolescence* 294.

¹⁷ Le Roux and Smith 1998 *Adolescence* 294.

¹⁸ Le Roux and Smith 1998 *Adolescence* 294.

¹⁹ Le Roux and Smith 1998 *Adolescence* 294.

²⁰ Ncube *Psychological needs, stressors and survival strategies of adolescent street children in Mzuzu, Malawi: A human development approach* 63-67.

²¹ Children in better situation or circumstances in this context are those children who live with parents, extended family and/or any alternative care and have access to family environment, healthcare, education, social assistance to name but a few. Although the author does acknowledge that in South Africa due to economic inequality and poverty some children who are not street children still face challenges.

²² The Republic of South Africa 2003 <http://www.ci.uct.ac.za/law-reform/childrens-act/bills-acts>.

²³ Barker 1999 <http://www.streetchildrenresources.org/wp-content/uploads/2013/02/children-of-the-street-durban.pdf>.

²⁴ Mokomane and Makoae 2017 *CFSWJ* 379.

²⁵ Lefeh *South African Government Responses to the Plight of Street Children: An Analysis of Policy Development and Implementation in Johannesburg* 26.

enrolling street children into programmes for children who do not necessarily have the same circumstances as street children and abandoned children in need of care.²⁶

The international and national laws pertaining to street children are discussed below.

1.2 The legal framework

National and international laws have been adopted by South Africa to promote and protect the rights of children. These laws are equally applicable to street children.

1.2.1 International legal framework

The *United Nations Convention on the Rights of the Child* (1989) (hereinafter the *CRC*) is the main international instrument for the promotion and protection of the rights of children and it applies to all children in all circumstances.²⁷ It defines a child as every human being below the age of 18 years "unless under law applicable to the child, majority is attained earlier".²⁸ The *CRC* promotes children's right to food, shelter, nationality, education, and freedom from torture, sexual violence, and exploitation.²⁹ While the *CRC* makes no particular reference to children living and working on the streets, all its provisions apply to them.³⁰

²⁶ See Lefeh *South African Government Responses to the Plight of Street Children: An Analysis of Policy Development and Implementation in Johannesburg* 26.

²⁷ UN General Assembly (UNGA), *Convention on the Rights of the Child*, 20 November 1989, UN, Treaty Series, vol 1577, p 3 (hereinafter the *CRC*).

²⁸ Art 1 of the *CRC*.

²⁹ The *CRC*; Health and Human Rights 2002 *All our children: human rights and children of the street* 1506; arts 8, 19, 27, 28, 34, and 37 of the *CRC*; art 2 of the *CRC* provides for the best interests of children, so the best interests of children in the street situation must be a primary consideration in all matters that concern them — by parents, carers, lawmakers, policy makers, welfare institutions, and those who influence or control resource allocation, including decisions throughout government, parliament and judiciary, as stated in the UN Committee on the Rights of the Child, General Comment No 5 *General measures of implementation of the Convention on the Rights of the Child*, CRC/GC/2003/5 (27 Nov 2003) (hereinafter General Comment No 5); art 3 provides for the non-discrimination principles and according to this article child in street situation have the right to be treated equally as other children; art 12 provides for child participation, which is a right and a practical imperative. The opinions of street connected children should inform policies, plans and interventions designated to address them.

³⁰ UNHR 2012
<https://www.ohchr.org/Documents/Issues/Children/Study/OHCHRBrochureStreetChildren.pdf>.

Notably, the UN Committee on the Rights of the Child, General Comment No 21 *on children in the street situation* established in 2017³¹ mandates that States uphold their obligations to apply a child-rights approach to strategies and initiatives for street children.³² The General Comment No 21 is important as its objectives are to clarify the obligations of States in applying a child rights approach to strategies and initiatives for street children; to provide comprehensive and authorities guidance to States in prevention measures regarding the violation of these children on the streets; to promote and protect the rights of children who are already in the street situation; to identify the implications of particular provisions of the *CRC* for street children to enhance respect for them as rights holders and full citizens; and to understand children's connection to the streets.³³

Additional to the *CRC* are the three Optional Protocols, which are also important to the protection of the rights of street children. These are the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children; Child Prostitution and Child Pornography³⁴; the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict,³⁵ and the Optional Protocol to the Convention on the Rights of the Child on a Communication Procedure.³⁶

An essential instrument that protects the rights of children in the street situation, given their risk of being trafficked, is the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.³⁷ The recently adopted

³¹ UN Committee on the Rights of the Child, General Comment No 21 *on children in street situations*, CRC/C/GC/21 (2017) (hereinafter General Comment No 21); South Africa has not yet ratified this general comment, as a result it is not a member state.

³² General Comment No 21 para 2.

³³ General Comment No 21 para 9.

³⁴ UNGA, *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, A/RES/54/263 (16 March 2001) (hereinafter the *OPSC*).

³⁵ UNGA, *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, A/RES/54/263 (25 May 2000) (hereinafter the *OPAC*).

³⁶ UN Human Rights Council, *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure: resolution/adopted by the Human Rights Council*, A/HRC/RES/17/18 (14 July 2011) (hereinafter the *OPIC*); UNHR 2012 <https://www.ohchr.org/Documents/Issues/Children/Study/OHCHRBrochureStreetChildren.pdf>.

³⁷ UNGA, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime* (15 November 2000); see 2000 <https://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolTraffickingInPresons>.

Guidelines for Alternative Care of Children³⁸ is another international instrument intended to enhance the implementation of the *CRC* and other international instruments regarding the protection and well-being of children deprived of parental care.³⁹ It provides guidance on policies and processes for the alternative care of children, including street children.⁴⁰

The provisions of international law will be discussed comprehensively in chapter 3 of this paper.

1.2.2 National legal framework

Section 28 of the *Constitution of the Republic of South Africa, 1996* (hereinafter the *Constitution*) provides an important benchmark in the protection of the rights of children in South Africa.⁴¹ Particularly, section 28(1)(b) provides that every child has the right to family care or parental care, or to appropriate alternative care when removed from the family environment. Section 28 (1)(c) further states that every child has the right to basic nutrition, shelter, basic health care services, and social services.⁴² These provisions also extend to street children.

This is evident in the case of *Government of the Republic of South Africa v Grootboom*⁴³ where the Court held that in the case of children with no parents or family, the State bears the primary duty to provide for these children's needs as provided specifically in sections 28(1)(b)-(c).⁴⁴ The *Grootboom* case is discussed in more detail in chapter 3.⁴⁵

³⁸ UNGA, *Guidelines for the Alternative Care of Children: resolution/adopted by the General Assembly, A/RES/64/142* (24 February 2010).

³⁹ UNHR 2012
<https://www.ohchr.org/Documents/Issues/Children/Study/OHCHRBrochureStreetChildren.pdf>.

⁴⁰ UNHR 2012
<https://www.ohchr.org/Documents/Issues/Children/Study/OHCHRBrochureStreetChildren.pdf>.

⁴¹ Section 28 of the *Constitution*.

⁴² Sections 28(1)(b)-(c) of the *Constitution*.

⁴³ 2000 11 BCLR 1169 (CC) (hereinafter the *Grootboom* case).

⁴⁴ *Grootboom* paras 73-75.

⁴⁵ See para 3.4.1 below.

The *Children's Act*⁴⁶ provides for the rights of children in South Africa with section 150 of the *Children's Act* providing for the child in need of care and protection.⁴⁷ In relation to street children, section 150(1)(c) further provides that a child is in need of care and protection if the child lives or works on the streets or begs for a living.⁴⁸

The problem that exists is that the number of street children is increasing both in South Africa and globally.⁴⁹ Although some legislation provides for the rights of children, it is not entirely clear who bears an obligation regarding street children.⁵⁰ This problem is worth researching, as children are a particularly vulnerable group in society.

Against this background, the question that comes to light is: what are the obligations of the State in protecting and promoting the rights of street children? To answer this question, domestic law is examined against various provisions of regional and international law to determine whether the South African government complies with these treaties in adequately protecting the rights of street children.

1.3 Research methodology

This mini-dissertation is based on a desktop study and is concluded using a literature review. Sources include legislation, case law, textbooks, journals, applicable electronic resources, and government policies.

1.4 Outline of the study

This mini-dissertation is divided into five chapters. Chapter 1 explores the introduction and problem statement and provides an overview of this mini-dissertation.

Chapter 2 consists of a theoretical discussion of the term "street children". The chapter explores the different understandings of the definition by various authors.

⁴⁶ 38 of 2005 (hereinafter the *Children's Act*).

⁴⁷ Bosman-Sadie and Corrie *A Practical Approach to the Children's Act* 217.

⁴⁸ Section 150(1)(c) of the *Children's Act*.

⁴⁹ See para 1.1 above.

⁵⁰ See para 3.4 below.

In addition to the definition, the characteristics of street children as well as the factors and causes that contribute to the phenomenon of street children (with a focus on South Africa) are discussed.

Chapter 3 examines the international, regional, and national legal framework put in place to recognise, promote and protect the human rights of children, specifically street children. International and South African jurisprudence is discussed to understand the obligations of the State towards street children.

Chapter 4 sets forth possible recommendations and strategies.

Chapter 5 concludes this mini-dissertation.

2 PERSPECTIVES ON STREET CHILDREN

2.1 Introduction

It is often difficult to determine exactly who street children are. This has led to problems in finding a universal definition. Ideally, such a definition needs to be broad enough to protect all children who may find themselves in the street situation. The aim of Chapter 2 is to explore and define the meaning of the term "street children" based on different understandings by various authors and international organisations. In so doing, categories of street children are outlined to determine whether such categories lead to a single definition of the term "street children". Furthermore, the characteristics of street children and the causes and factors, which contribute to the "street children" phenomenon in the South African context, are discussed. Outlining these causes and factors that lead to the street children phenomenon might assist in creating policy and legislation that pays particular attention to these causes.

2.2 Who are "street children"?

There has been a growing body of domestic and international literature attempting to define and describe the phenomenon of street children. The nature and scope of the term "street children" have widened over the years. The definition provided by the United Nations International Children's Emergency Fund (UNICEF) defines the term "street children" as

any girl or boy for whom the street (in the widest sense of the word, including unoccupied dwelling, wasteland, etc.) has become his or her habitual abode and/or source of livelihood; and who is inadequately protected, supervised or directed by responsible adults.⁵¹

⁵¹ Glasser *Homeless in a Global Perspective* 54. See also Sanji *Resilience and the Re-integration of Street Children and Youth in Sub-Saharan Africa: The case of Cameroon* 4; Lalor *Street Children: A Comparative Perspective* 759; Mafokane 2014 *Social Work* 136.

The report by the Independent Commission on International Humanitarian (ICIH) provides a similar definition to the one provided by UNICEF and defines street children as

a street child or street youth is any underage person for whom the street (in the broadest meaning of the word, including inhabited residences, wastelands, etc.) has become his or her usual place of residence, and this person cannot find adequate protection.⁵²

There has also been some categorisation of street children. According to UNICEF, there are three types of street children:

- Children who reside on the street: children who ran away from their families and live alone on the street.
- Children who work on the street: children who spend most of their time on street, but who regularly go back to their homes.
- Children from street families: children who live with their families on the street.⁵³

Ray argues that the above definition by UNICEF appears to be incomplete and offers the following reasons.⁵⁴ First, Ray argues that one must refrain from using the term "street" in a narrow sense, restricted to the physical realm and that a broader connotation of the term must be used.⁵⁵ In this sense, he states that a street child may not "live" or "earn" by solely operating on the streets as she or he may be living in a shelter, in partially constructed buildings, or temporary houses.⁵⁶ Secondly, Ray points out that a street child may or may not be a part of the disintegrated and dysfunctional family structure.⁵⁷

⁵² Angeli *Street Children a Growing Urban Tragedy: A Report for Independent Commission on International Humanitarian Issues* 30.

⁵³ Black *Street and Working Children: Global Seminar Report, UNICEF Innocenti Center* 7 – 8.

⁵⁴ Ray 2017 *TQR* 292.

⁵⁵ Ray 2017 *TQR* 292.

⁵⁶ Ray 2017 *TQR* 292.

⁵⁷ Ray 2017 *TQR* 292; "disintegrated family" represents the climax of any of the various forms of family disorganisations which is a process that takes different forms depending on the locus of conflict within family relations, whereas "dysfunctional family" may be understood to be any condition that interfere with healthy family functions. See also Mowrer *The Trend and Ecology of family Disintegration in Chicago* 1.

Street children are further categorised into two groups; (1) children of the street and (2) children in the street. "Children of the street" refers to those children who live on the streets as "street living children" and "children in the street" refers to those children who work on the streets or come to the streets during the day but return elsewhere at night, which is why they are often referred to as "street working children".⁵⁸

In South Africa, however, various authors and practitioners used to define "street children" differently from the above definition provided by UNICEF. They define "street children" as

those who have abandoned (or have been abandoned) by their families, schools, and immediate communities before they are sixteen years of age and [have] drifted into a nomadic street life⁵⁹

It is worth noting that this definition only includes children who permanently live on the streets and excludes those who are on the streets during the day and go home at night. The reason for this, according to Treanor, is that during the apartheid era children in the streets were relatively scarce in the cities of South Africa (due to restrictions on movement put in place by the apartheid government).⁶⁰ However, this definition has since been broadened to include other categories of children in the street situation in South Africa. As a result, "street children" are defined in the *Gauteng Street Children Shelter Act*⁶¹ and *Children's Act* as children:

- mainly living on the streets for survival;
- because of abuse and neglect, poverty, community upheaval or any other reason has left his or her home, family or community and lives, begs or work on the streets
- institutionalised and are from homelessness situations, and are at risk of returning to the existing homelessness;
- removed from their families and move from one place to another;

⁵⁸ See Mafokane 2014 *Social Work* 134.

⁵⁹ Ritcher 1988 *CCW* 31. See also Treanor 1990 *FLR* 881; Le Roux and Smith 1998 *Adolescence* 680.

⁶⁰ Treanor 1990 *FLR* 883.

⁶¹ 16 of 1998.

- living in a temporary shelter like abandoned homes or buildings; and
- who still have ties with their families but due to poverty, overcrowding in the family and sexual, physical and emotional abuse, they spend some nights and most days on the streets.⁶²

In light of all the categories of street children discussed above, Benitez further categorises street children as street living children, including those children who have lost daily contact with their families; and street working children who work on the street during the day and then return home in the evening.⁶³ Lastly, "city market children" are children that work in close proximity to their families and within the community environment of a market and make a small contribution to the family income.⁶⁴ It is worth noting that children of the streets only constitute a minority of children who struggle daily for survival; whilst often called "abandoned" these children might have also abandoned their families due to insecurities and rejection or growing up within a family in which violence ensues daily. For example, LGBTIQ+ children and youth in South Africa are often rejected by their families because of their sexual orientation or gender identity, which leads to them being forced to live on the streets and thereby leading to the increasing population of street children in South Africa.⁶⁵

⁶² The *Children's Bill*, B 70—2003; the purpose of the *Bill* is to give effect to certain rights of children as contained in the *Constitution*; to set out principles relating to the care and protection of children; to define parental responsibilities and rights; to make further provision regarding children's courts; to provide for the issuing of contribution orders; to make new provision for the adoption of children; to provide for inter-country adoption; to give effect to the *Hague Convention on Inter-country Adoption* (2003); to prohibit child abduction and to give effect to the *Hague Convention on International Child Abduction* (1996); to provide for surrogate motherhood; to create certain new offences relating to children; and to provide for matters connected therewith; see also section 1 of the *Children's Act*.

⁶³ De Benitez *Approaches to reducing poverty and conflict in an urban age: the ease of homeless children, youth explosion in developing world cities* 109.

⁶⁴ De Benitez *Approaches to reducing poverty and conflict in an urban age: the ease of homeless children, youth explosion in developing world cities* 109.

⁶⁵ The LGBTIQ+ youth, according to Solomons who is a director of *Molo Songololo* (NGO), are "chucked out of the house when they come out". He further states that the LGBTIQ+ youth can face discrimination, marginalisation, suppression and not being accepted by family, schools, communities, and are particularly vulnerable to bullying, sexual abuse and exploitation. See Mail & Guardian 2016 <https://www.google.co.za/amp/s/.mg.co.za/article/2016-11-09-00-theres-no-place-like-home-for-queer-youth-kicked-out-by-their-families>. See also Fraser *et al* 2019 *International Journal of Environment Research and Public Health* 2. The acronym *LGBTIQ+* refers to Lesbian, Gay, Bisexual, Transgender, Intersex, Queer and Asexual.

Panter-Brick is of the view that identifying street children is more problematic than it may appear to be because the "generic of the term 'street children' obscures the heterogeneity of children's actual circumstances".⁶⁶ In addition, Panter-Brick posits that the term is not a good reflection of these children's own description of their lives nor does it reflect the fluidity of the way in which they move on and off the streets.⁶⁷ Panter-Brick further points out that the use of the term can appear to delineate a distinct group of children and in doing so draw attention towards "the most visible tip of the iceberg", which refers to children living in poverty.⁶⁸

The reason for this assertion is because street children encompass a wide range of children and within this range, there are other identifiable groups of children with different characteristics, conditions, and developmental needs. To illustrate this, the following example is used to illustrate the development needs of street children which includes health, education, emotional and behavioural development, identity, family and social relationships, as well as self-care skills.

Some children develop slower than others due to the nature of life on the streets, such as malnutrition and being underfed, which affects their health. Some children have behavioural issues and this renders it difficult for them to form any social relationships with other children. "Children on the street" may have familial connections, whereas "children of the street" have none; this distinguishes "children on the street" and "children of the street", as the "children on the street" might know their identity and where they come from whereas "children of the street" might not.⁶⁹

With the various definitions of the term and categories of street children provided above by UNICEF and ICIH, Pare proposes that the term could be replaced with a "more socially acceptable term, such as autonomous homeless children".⁷⁰ The

⁶⁶ Panter-Brick 2002 *Annual Review of Anthropology* 151.

⁶⁷ Panter-Brick 2002 *Annual Review of Anthropology* 151.

⁶⁸ Panter-Brick 2002 *Annual Review of Anthropology* 151

⁶⁹ See para 2.3 below.

⁷⁰ Pare *Why have street children disappeared? – The role of international human rights law in protecting vulnerable groups* 4.

usage of the concept "autonomous" by Pare suggests that street children have the ability to act on their own values and interests given the fact that they (mostly children of the street) do not have protection or guidance from parents or guardians.⁷¹ Although I do not agree with Pare's view as it presupposes that street children are not worthy of protection once on the street, especially taking into account the children's age and vulnerability.

Schimmel, on the other hand, suggests the use of the term "street-living children" because he is of the view that the term is "ambiguous and self-explanatory" and therefore appropriate to refer to children living on the street without parental supervision.⁷² The articulation by Schimmel somehow only refers to "children of the streets" and not those "on the streets".⁷³ Furthermore, Mafokane is of the view that some people may be sceptical about using the term "street children" because of its emotional nuances.⁷⁴ Mafokane asserts:

In a diverse society such as the South African one, it is to be expected that individuals will attach different meanings to the term based on their socio-cultural backgrounds and language.⁷⁵

It may be submitted, given the different perspectives on street children, that the current one does not distinguish street children so radically from other poor children or conceptualise the homeless in isolation from other groups of children facing adversity. Here, I refer to the definition provided by UNICEF and ICIH.⁷⁶ However, welfare practitioners now speak of "children at risk" and conceptualises street children as one of the groups more at risk that require a higher level of attention.⁷⁷

⁷¹ Pare *Why have street children disappeared? – The role of international human rights law in protecting vulnerable groups* 4. See also Vandernbroeck *Autonomous Children, Privileging Negotiation, and New Limits to Freedom* 74.

⁷² Schimmel 2006 *International Journal of Children's Rights* 215.

⁷³ The term "children of the street" refers to those who live on the streets without adult supervision whereas "children on the street" refers to those who beg and do menial work on the streets and return home to contribute towards their families' livelihood; See Richter 1991 *The Child Care Worker* 5.

⁷⁴ Mafokane 2014 *Social Work* 138.

⁷⁵ Mofokane 2014 *Social Work* 139.

⁷⁶ See para 2.2 above regarding the definition provided by UNICEF.

⁷⁷ Panter-Brick 2002 *Annual Review of Anthropology* 149. Note that the reference to street children as "children at risk" came about the development of legislation relating to children, such as the *CRC*, *Child Care Act*, and other relevant policies.

Furthermore, the various definitions above of the street children phenomenon rely on different criteria. These include the reliance on the place of residency (the street) to tailor the definition, whilst others rely on the type of familial relationships and the nature of the time spent on the street.⁷⁸

I suggest the use of the term "children in the street situation" rather than "street children". I prefer this term as it is broader and thus includes more children. It is less stigmatising and is a better umbrella term to best understand the situation of all the children in the street situation. It covers the resilience, cultural diversity, and transactional patterns of street children. Another reason is that different sources, such as those provided in this study, seem to articulate the fact that the problem is not the "street children" but the situation causing the children to be on the streets.

The realities on the streets can be damaging to the child as the human dignity of children in the street situation is often violated.⁷⁹ The definition must be formulated from the lived experiences of these children, which is why "children in the street situation" might best define, in a much broader sense, the plight of street children across the world.

The following section discusses the characteristics of children street situation in South Africa, and the term "children in the street situation" will now be use throughout this paper.

2.3 Characteristics of children in the street situation South Africa

There are various characteristics of children in the street situation. Generally, street children face difficulties in providing themselves with good sources of food, clean drinking water, access to health care services, toilets, and bath facilities, and adequate shelter.⁸⁰ Therefore, like the definition of the term "street children", there

⁷⁸ See the definition by UNICEF, ICIH and South African definition above.

⁷⁹ See *Villagran Morales v Guatemala*, Merits, IACHR Series C no 63, (1999) IACHR 17, IHRL 1446 (IACHR 1999).

⁸⁰ Ibrahim 2012 <https://www.e-ir.info/2012/12/11/characteristics-of-street-children> at 3.

is growing literature on the characteristics of children in the street situation, which provides insight into the profile of the street children.⁸¹

In respect of gender representation it is estimated that the majority of children in the street situation are predominantly boys.⁸² The reason why it is predominately boys on the street in South Africa is because of different elements, such as socio-cultural factors connected to gender.⁸³ According to Gebers and Le Roux, in South Africa, girls (female children) are traditionally responsible and tasked with the home responsibilities of taking care of their younger siblings and attending to home chores.⁸⁴ In this sense, girl children are less inclined to street life, as in most African cultures gender norms are more restrictive on girls, and as result there are more boys on the street than girls.⁸⁵

Regarding the race of children in the street situation; a study by Ward and Seager concludes that majority of street children in South Africa are black (compared to any other race).⁸⁶ This finding is similar to that of the 2008 Report by the Human Sciences Research Council (HSRC) as outlined in Hills, Meyer-Weitz and Asante that, indeed, the majority of these children are black and males.⁸⁷

It is noteworthy that in some provinces, such as Durban and Cape Town, various studies indicate that there are mostly black and coloured children in the street situation (predominantly boys).⁸⁸ This is due to the standard of living during the apartheid era, as argued by van Blerk and Lemanski, which has not changed for the

⁸¹ Aptekar *Street children in the developing world: A review of their condition* 195; Le Roux and Smith 1998 *Adolescence* 683.

⁸² Gebers *Health of street children in Cape Town* 12. See also Richter *Street children in South Africa: General theoretical introduction* 22; Schafer *Child Law in South Africa: Domestic and International Perspective* 49.

⁸³ Friberg and Martinson *Problems and Solutions when Dealing with Street Children* 12.

⁸⁴ Gebers *Health of street children in Cape Town* 11; Le Roux 1996 *Adolescence*.

⁸⁵ Gebers *Health of street children in Cape Town* 12.

⁸⁶ Ward and Seager 2010 *Development Southern Africa* 88.

⁸⁷ Hills, Meyer-Weitz and Asante 2016 *Int J Qualitative Stud Health Wellbeing* 1.

⁸⁸ Lemanski 2004 *Environment and urbanisation* 101. See also Salo 2009 *Feminist Africa* 11; van Blerke 2012 *Children's Geographies* 324.

better as blacks and coloureds are still experiencing the same spatial and economic marginality compared to the white population.⁸⁹

In relation to age group, most of the children in the street situation range from 3 to 18 years.⁹⁰ According to Le Roux and Smith, many of children seem much younger than their actual ages due to malnutrition.⁹¹ Richter contends that the obvious inadequate physical appearance amongst street children in South Africa, specifically black people (mostly underweight), was previously due to their social conditions as a result of apartheid.⁹²

The average age at which children in the street situation start living on the street is between 9 and 12 years and they keep living on the streets until they reach the age of 15 to 16 years.⁹³ Le Roux concurs that the average age of the children in the street situation is 12 and these children are predominantly male and of African origin.⁹⁴ A similar study conducted by Richter provides that children in the street situation in South Africa range between the age of 7 and 18 years with the majority between the age of 13 and 18 years.⁹⁵ There is an age difference between children in the street situation in developing and developed countries.⁹⁶

Richter states that whilst the ages of children in the street situation in developing countries usually range between 11 to 16 years, in developed countries, it is usually 16 years and older.⁹⁷ These age differences between developing and developed countries may be due to the available social resources in these countries; and in South Africa, to a certain extent, there are fewer resources immediately available to meet the needs of children in the street situation than developed countries. As a

⁸⁹ Van Blerk 2012 *Children's Geographies* 324-25; Lemanski 2004 *Environment and urbanisation* 103.

⁹⁰ Haxhiymeri and Hazizaj 2011 *Save the Children* 10.

⁹¹ Le Roux and Smith 1998 *Adolescence* 684.

⁹² Richter *A Psychological Study of "Street Children" in Johannesburg* 28.

⁹³ Le Roux and Smith 1998 *Adolescence* 684.

⁹⁴ Le Roux *The worldwide phenomenon of street children: Conceptual analysis* 965.

⁹⁵ Richter *Street children in South Africa: General theoretical introduction* 2.

⁹⁶ Richter *Street children in South Africa: General theoretical introduction* 2.

⁹⁷ Richter *Street children in South Africa: General theoretical introduction* 3.

result, children from developing countries are more vulnerable as they tend to be on the street from a younger age.

Pertaining to culture, morals, and traditions, children in the street situation are usually not concerned about culture and morals owing to absence from their families since childhood.⁹⁸ Lugalla and Mbwambo describe children in the street situation as "not only homeless or roofless but they are also culturally rootless".⁹⁹ What Lugalla and Mbwambo mean is that most children in the street situation do not have any connection with their roots, their cultures and do not know who they are.

All children must be aware of their roots and culture as this is important for the child development process. Cultural values are also an important source of resilience.¹⁰⁰ Panicker also points out that many of the children in South Africa are rootless, mostly because they exist without resources, homes, education, guidance, and care or affection.¹⁰¹

Children in the street situation are often brutalised by police, older street children, and gang members and are often exposed to drug dealers and pimps.¹⁰² Hills, Meyer-Weitz and Asante point out that females are often the victims of rape on the streets.¹⁰³ This indicates how powerless and overwhelmed females are on the streets. However, Motala and Smith indicate that some male street children disclosed that they slept at different places at night in fear of being raped.¹⁰⁴ The lack of protection and shelter put street children at a much greater risk of rape than the general population; in particular, females are more vulnerable.¹⁰⁵

Children in the street situation also experience violence amongst themselves, which is mostly perpetrated by older children.¹⁰⁶ This type of violence necessitate the

⁹⁸ Hills, Meyer-Weitz and Asante 2016 *Int J Qualitative Stud Health Wellbeing* 5.

⁹⁹ Lugalla and Mbwambo 2002 *IJURR* 331.

¹⁰⁰ Theron and Malindi 2010 *South African Journal of Psychology* 323.

¹⁰¹ Le Roux and Smith 1998 *Adolescence* 688; Myburgh, Moolla and Poggenpoel 2015 *Curationis* 2.

¹⁰² Le Roux and Smith 1998 *Adolescence* 688. See also Myburgh Moolla and Poggenpoel 2015 *Curationis* 2; Schimmel 2006 *The International Journal of Children's Rights* 227.

¹⁰³ Hills, Meyer-Weitz and Asante 2016 *Int J Qualitative Stud Health Wellbeing* 5.

¹⁰⁴ Motala and Smith 2003 *Agenda* 72.

¹⁰⁵ Hills, Meyer-Weitz and Asante 2016 *Int J Qualitative Stud Health Wellbeing* 5.

¹⁰⁶ Hills, Meyer-Weitz and Asante 2016 *Int J Qualitative Stud Health Wellbeing* 6.

importance of social networks amongst children in the street situation; children who do not have ties with their families form peer groups (quasi family).¹⁰⁷ These peer groups thus play the role of family and are a source of solidarity, income, and emotional support.¹⁰⁸ They replace their family with social groups or gangs.¹⁰⁹

Children in the street situation are subject to dangerous and illegal activities such as drug dealing, crime, theft, and other related gang activities.¹¹⁰ However, many children in the street situation also undertake legal economic activities, such as being car guards, car washing, baggage loading, and other pursuits.¹¹¹ These seemingly "legal" economic activities, however, may be illegal as they may result in exploitation and unlawful child labour practices.¹¹²

The following section explores the causes and factors that contribute or lead to the children in the street situation phenomenon.

2.4 Causal factors (causes and factors) contributing or leading to the children in the street situation phenomenon

The causal factors leading to children in the street situation phenomenon vary among different countries and regions. Many authors agree that the leading causes include, *inter alia*, economic factors, poverty, and familial breakdown or the abandonment of children (including abuse or neglect).¹¹³ Scholars on children in the street situation, such as Le Roux, state that the children in the situation phenomenon in South Africa is a result of the pervasive political system of apartheid,

¹⁰⁷ Le Roux and Smith 1998 *Adolescence* 688. See also Lugalla and Mbwambo 2002 *IJURR* 338; Hills, Meyer-Weitz and Asante 2016 *Int J Qualitative Stud Health Wellbeing* 8.

¹⁰⁸ Lugalla and Mbwambo 2002 *IJURR* 338.

¹⁰⁹ Grundling, de Jager and de Fourie 2004 *SA Technicon Pretoria* 97.

¹¹⁰ Le Roux and Smith 1998 *Adolescence* 688; Schimmel 2006 *The International Journal of Children's Rights* 227; Myburgh, Moola and Poggenpoel 2015 *Curationis* 2.

¹¹¹ Le Roux and Smith 1998 *Adolescence* 688; Lugalla and Mbwambo 2002 *IJURR* 338.

¹¹² See Lugalla and Mbwambo 2002 *IJURR* 338.

¹¹³ Mahlangu *Factors that contribute to street children leaving rehabilitation centres and returning to the streets* 1; See also Malindi *The antecedents of resilience among street children* 62; Le Roux *A historical-educational perspective of urbanisation and its contribution to the street child phenomenon in South Africa* 95; Lewis *Also God's Children? Encounters with street kids* 4; Pare *Why have street children disappeared? – The role of international human rights law in protecting vulnerable groups* 5.

which was based on racial discrimination and segregation.¹¹⁴ This could be attributed to the fact that during apartheid there existed an obvious neglect of black children who required care and protection and racially segregated institutional care facilities for children.¹¹⁵

Secondly, black people were excluded from most economic activities, which ultimately led to poverty.¹¹⁶ This is the root of the plight of children in the street situation — this exclusion, by the apartheid government, continues to play a role in escalating the numbers of South Africa's street children. Lastly, the political violence during apartheid that tormented many townships was a direct cause of children abandoning their homes.¹¹⁷ According to Treanor when this happened family members were no longer able to take care of each other, and in the absence of support by adult family members, children took to the streets to be able to take care of themselves.¹¹⁸

In general, children in the street situation are a manifestation of the problems that children and communities experience as a result of health, social, and economic factors, which render parents, caregivers or guardians less effective in providing for the child's well-being — thus, leading to their marginalisation. As already stated above, studies indicate that in South Africa there are currently more black children in the street situation.

Smit presents the three key causal factors of the children in the street situation phenomenon according to the following levels: (1) micro-level causes; (2) meso-level causes; and (3) macro-level causes.¹¹⁹ Each causal factor is discussed in turn.

¹¹⁴ Le Roux 1996 *Adolescence* 423.

¹¹⁵ Le Roux 1996 *Adolescence* 427; Swart 1990 *JCHSA* 5.

¹¹⁶ See Treanor *FLR* 889 – 892.

¹¹⁷ Le Roux *Adolescence* 427.

¹¹⁸ Treanor *FLR* 892.

¹¹⁹ Smit *Homeless* 26.

2.4.1 Micro-level causes

These refer to the factors within children themselves. They involve the feelings of inferiority, a need for personal attention, neglect, orphanhood, feeling useless, the desire to survive on their own, a love of adventure and exploration, peer or group pressure, and being victims of exploitation.¹²⁰

2.4.2 Meso-level causes

These are factors within the family context and give rise to children in the street situation problems not only in South Africa but across the world. These include, but are not limited to, migration of parents, family disintegration, single-parent families, physical and psychological maltreatment of children, lack of parental control and supervision, the collapse of traditional values, parental absence, presence of stepfathers, and value clashes between parents and children.¹²¹

2.4.3 Macro-level causes

These are causal factors within the community and include urbanisation, forced settlement, overcrowding, non-compulsory education, school boycotts in the past, destruction of schools due to vandalism, scarcity of employment opportunities, lack of recreational facilities, violence, unrest, and a lack of community involvement.¹²²

In addition to the above three categories, one of the most prevalent underlying causes is poverty.¹²³ In South Africa, the poverty issue has been profoundly exacerbated by apartheid.¹²⁴ During the years of apartheid, government policies substantially contributed to the underlying causes of the children in the street situation— directly and indirectly.¹²⁵ It is noteworthy that since poverty lead children

¹²⁰ Smit *Homeless* 26; Mokomane and Makoae 2017 *CFSWJ* 379.

¹²¹ Smit *Homeless* 26. See also Mokomane and Makoae 2017 *CFSWJ* 379; Aptekar *Street children in the developing world: A review of their condition* 195.

¹²² Smit *Homeless* 26; Aptekar *Street children in the developing world: A review of their condition* 195.

¹²³ Smit *Homeless* 26; Aptekar *Street children in the developing world: A review of their condition* 195.

¹²⁴ Treanor *FLR* 886 – 893.

¹²⁵ Le Roux 1997 *Koers* 345.

to the street, the great majority of children who live in economic poverty end up on the street. Poverty is one of the major push factors.¹²⁶ Many black South Africans find themselves in disadvantaged economic circumstances.¹²⁷ Thus, Le Roux and Van Zyl identify the following causal factors as cited by Schurink *et al*:

- (i) Because of lower income there is often a decrease in the living standard of a single parent family;
- (ii) A family must often move to a lesser environment;
- (iii) Employment is not always permanent and thus leads to financial and emotional problems;
- (iv) Surviving parents often experience much stress, not only because of their financial situation but also as a result of emotional problems;
- (v) Uncontrolled urbanisation and resultant employment cause negative living conditions in slums and squatter camps. Which in turn has a negative influence on relationship formation in the family. ¹²⁸

Other underlying causes leading to the children in the street situation phenomenon are drug abuse and change in family structure.¹²⁹ These causes constitute push and pull factors owing to the phenomenon in South Africa and across the world. Kilbride, Suda and Enjeru also identify some of the causes leading to the children in the street situation phenomenon in Africa, specifically in Kenya (which are also applicable to the children in the street situation phenomenon in South Africa):

- Poverty due to unemployment (of parents)
- Decline in indigenous family values
- Lack of government programs owing to lack of funding, implementation or corruption
- Recruitment by street children to possibly feel a sense of community

¹²⁶ Le Roux 1997 *Koers* 345.

¹²⁷ Le Roux 1997 *Koers* 346; Le Roux *The black child in crisis: a socio-educational perspective* 23.

¹²⁸ Le Roux *Street-Wise: Towards a Relevant Education System for Street Children in South Africa* 68; Van Zyl *Street Children: An Historical-Educational Perspective with Special Reference to the Republic of South Africa*; see also Schurink *et al Street Children* 14.

¹²⁹ Ward and Seager 2010 *Development Southern Africa* 89. See also Myburgh, Moolla and Poggenpoel 2015 *Curationis* 3; Hills, Meyer-Weitz and Asante 2016 *Int J Qualitative Stud Health Wellbeing* 4-5.

- Increase in cost of living owing to economic decline.¹³⁰

The above discussion identifies the reasons for the emergence of street children and is crucial in attempting to find permanent solutions to the problem in South Africa and across the world. Some authors are of the view that the emergence of street children is intertwined with the totality of urban problems as the phenomenon is exclusively urban, with the notion that "there are no rural street children".¹³¹ While this notion is only true to a certain extent (street children are usually found in urban areas) many of these children have rural origins.¹³² The problem extends beyond urbanisation. Therefore, it may be argued that there is indeed no single factor causing street children in South Africa.

2.5 Conclusion

The definition of the term "street children" continues to create more difficulties in attempting to find a universal definition. Many authors and international organisations seem to identify children in the street situation as a homogenous group, withstanding the fact that they all have unique reasons explaining their existence on the street as, well as other circumstances regarding their livelihood on the streets.

The "children in the street situation" covers all children who may find themselves in the street situation, their resilience, cultural diversity, and transactional patterns. It is thus a better term to use and broad enough to cover all children in the street situation.

The characteristics of children in the street situation, as identified above by various authors, suggest that in South Africa and globally there are predominantly more males than female children. Most of children in the street situation are black and their ages range from as young as 3 to 18 years. Once on the streets, these children are exposed and are often victims of violence and other forms of aggression. The

¹³⁰ Kilbride, Suda and Enjeru *Street children in Kenya: Voices of children in search for a childhood* 25.

¹³¹ Lugalla and Mbwambo 2002 *IJURR* 341.

¹³² Lugalla and Mbwambo 2002 *IJURR* 341.

causes and factors leading to the children in the street situation phenomenon are similar for many countries owing to available resources in those nations, therefore the causal factors are unique for each country, including South Africa. However, economic poverty seems to be the main contributing factor.

The next chapter unpacks the international and domestic legal frameworks applicable to children in the street situation.

3 LEGAL FRAMEWORK APPLICABLE TO CHILDREN IN THE STREET SITUATION

3.1 Introduction

International human rights and regional instruments have an impact on the protection and promotion of the rights of children in the street situation within municipal law. The focus of this chapter is to explore international, regional, and national legal provisions applicable to children in the street situation. Against this background, the legal mechanisms already put in place by the State are discussed and whether these mechanisms adequately provide the same protection to children in the street situation.

Furthermore, compliance by the South African legal system is assessed and whether it complies with the international standards pertaining to the protection and promotion of the rights of children in the street situation. Relevant international case law is also discussed in the context of children's rights.

3.2 International law

Section 39 of the *Constitution of the Republic of South Africa*, 1996 deals with the interpretation of the Bill of Rights and places an obligation on South African courts to consider international law as a mandatory requirement. It provides that:¹³³

(1) When interpreting the Bill of Rights, a court, tribunal or forum—

[...]

(b) must consider international law; [...]

The South African government is also mandated to ensure that the necessary legislation is adopted in compliance with international law.¹³⁴ This is described by the two approaches that South Africa follows, namely the "monist" and "dualist"

¹³³ Section 39 of the *Constitution*.

¹³⁴ Ferreira and Snyman 2014 *PELJ* 1471.

approaches.¹³⁵ The country follows the monist approach where international customary law is concerned in terms of section 232 of the *Constitution*¹³⁶ but follows the dualist approach where treaties are concerned in terms of section 231 of the *Constitution*.¹³⁷ As a result, international treaties must first be incorporated into South African law by legislative enactment.¹³⁸

The Constitutional Court in *Glenister*¹³⁹ has held that the South African *Constitution* reveals a clear determination to ensure that the *Constitution* and South African law are interpreted in a manner that complies with international law, particularly human rights law.¹⁴⁰ Section 233 of the *Constitution* provides that:

When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.¹⁴¹

According to Schafer, this interpretation does not only apply to the Bill of Rights; it "governs the interpretation of 'any legislation'".¹⁴² This presumes that parliament does not intend to violate international law, in that it swings the balance in favour of any "reasonable" interpretation that is consistent with international law.¹⁴³

The provisions of sections 39(1)(b), 231,¹⁴⁴ 232, and 233 in our *Constitution* clearly demonstrate that international law has an important place in our national law, which is carefully defined in the *Constitution*.

¹³⁵ Dugard *International Law: A South African Perspective* 42. See also Ferreira and Snyman 2014 *PELJ* 1471.

¹³⁶ Section 232 of the *Constitution* provides that customary international law is law in the Republic unless it is inconsistent with the *Constitution* or an Act of parliament.

¹³⁷ Section 231(4) of the *Constitution* provides that any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by parliament is law in the Republic unless it is inconsistent with the *Constitution* or an Act of parliament.

¹³⁸ Dugard *International Law: A South African Perspective* 42. See also *Azanian Peoples Organisation v President of the Republic of South Africa* 1996 4 SA 672 para 26.

¹³⁹ *Glenister v President of the Republic of South Africa* 2001 3 SA 34 (CC) (hereinafter the *Glenister* case) para 97.

¹⁴⁰ *Glenister* para 97.

¹⁴¹ Section 233 of the *Constitution*.

¹⁴² Schafer *Child Law in South Africa: Domestic and International Perspective* 83.

¹⁴³ Schafer *Child Law in South Africa: Domestic and International Perspective* 83.

¹⁴⁴ It is stated that the constitutional scheme of s 231 is deeply rooted in the separation of powers in particular checks and balances between the executive and the legislature. It contemplates

The next section consists of an examination of different international law instruments relating to children in the street situation.

3.2.1 *The Geneva Declaration of the Rights of the Child 1924*

In 1924, the League of Nations adopted the *Geneva Declaration of the Rights of the Child* (the *Geneva Declaration*).¹⁴⁵ It is generally regarded as the starting point of the modern notion of children's rights and the first international instrument that addressed children directly.¹⁴⁶ In the Preamble, the *Geneva Declaration* stipulates that "mankind owes the child the best it has to give".¹⁴⁷ Responsibility regarding the protection of the rights of children is placed on adults. It is the first international instrument to recognise the protection of the rights of children in the street situation and refers to them as "waifs".¹⁴⁸ This is made clear by the provision of article 2, which stipulates that

The child that is hungry must be fed; the child that is sick must be nursed; the child that is backward must be helped; the delinquent child must be reclaimed; and the orphan and the waif must be sheltered and succoured.¹⁴⁹

Although the *Geneva Declaration* refers to the rights of the child, its provisions merely provide for children as persons in need of specific care and treatment.¹⁵⁰

three legal steps that may be taken in relation to an international agreement, with each step producing different legal consequences. First, it assigns to the national executive the authority to negotiate and sign international agreements. However, an international agreement signed by the executive does not automatically bind the Republic unless it is an agreement of a technical, administrative or executive nature. To produce that result, it requires, second, the approval by resolution of parliament. The approval of an agreement by parliament does not, however, make it law in the Republic unless it is a self-executing agreement that has been approved by parliament, which becomes law in the Republic upon such approval unless it is inconsistent with the *Constitution* or an Act of parliament. Thirdly, an international agreement becomes law in the Republic when it is enacted into law by national legislation; see *Glenister* paras 89-90.

¹⁴⁵ UN General Assembly, *Declaration of the Rights of the Child* (1924), 20 November 1959, A/RES/1386(XIV) (hereinafter the *Geneva Declaration*).

¹⁴⁶ Schafer *Child Law in South Africa: Domestic and International Perspective* 71.

¹⁴⁷ The Preamble of the *Geneva Declaration*.

¹⁴⁸ A waif is defined as "a homeless, neglected, or abandoned person, especially a child"; Hornby *Oxford Advanced Learner's Dictionary: international student's edition* 1688.

¹⁴⁹ Art 2 of the *Geneva Declaration*; see footnote 145 above.

¹⁵⁰ According to the *Geneva Declaration* the following provisions, which are referred to as the rights of the child, *must* be accorded to the child: art 1: the child must be given the means requisite for its normal development, both materially and spiritually; art 2: the child that is hungry must be fed; the child that is sick must be nursed; the child that is backward must be helped; the delinquent child must be reclaimed; and the orphan and the *waif* must be sheltered and

Thus, it may be argued that to a certain extent the *Geneva Declaration* was not intended to place a binding obligation upon States as it is merely a declaration. In fact, it is the "men and women of all nations" who are placed with this burden to live up to these provisions rather than the State.¹⁵¹ However, despite the provisions of the *Geneva Declaration* not having the force of enforceable law, it is still of significant importance.¹⁵²

According to Rios-Kohn, there are three reasons why the *Declaration* is significant. First, it serves as one of the first examples that established the concept of rights for children, internationally.¹⁵³ Secondly, it enshrined the economic and social rights of children.¹⁵⁴ Lastly, using the terminology "rights of the child" clearly indicates a link between child welfare and the rights of the child.¹⁵⁵

3.2.2 *The Universal Declaration on Human Rights (1948) and Declaration of the Rights of the Child (1959)*

The *Universal Declaration on Human Rights (UDHR)* was drafted by the Commission on Human Rights and adopted by the United Nations Assembly on 10 December 1948. Although it was not enacted as a treaty and was, at the time of its adoption, seen as aspirational and not binding, Crawford argues that the drafters of the *UDHR* sought to derive its authority from the binding obligations of the *Charter of the United Nations (1945)*.¹⁵⁶

succoured; art 3: the child must be the first to receive relief in times of distress; art 4: the child must be put in a position to earn a livelihood and must be protected against any form of exploitation; art 5: the child must be brought up in the consciousness that its talents must be devoted to the service of its fellow men. See also Maslen *Relevance of the Convention on the Rights of the Child to Children in armed conflict* 358.

¹⁵¹ *Declaration on the Rights of the Child (1924)* adopted by the Assembly of the League of Nations; Van Bueren *The International Law on the Rights of the Child* 7.

¹⁵² Rios-Kohn *The Convention on the Rights of the Child: Progress and Challenges* 140. See also Liefwaard *Deprivation of Liberty of Children* 22.

¹⁵³ Rios-Kohn *The Convention on the Rights of the Child: Progress and Challenges* 140.

¹⁵⁴ Rios-Kohn *The Convention on the Rights of the Child: Progress and Challenges* 140.

¹⁵⁵ Rios-Kohn *The Convention on the Rights of the Child: Progress and Challenges* 140.

¹⁵⁶ Crawford *Brownlie's Principles of Public International Law* 565.

Furthermore, its Preamble refers to the affirmation of human rights by "the people of the United Nations" and reminds States that membership of the United Nations entails a

pledge [...] to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms.¹⁵⁷

Article 25 of the *UDHR* guarantees everyone the right to an adequate standard of living and paragraph 1 provides that

everyone has the rights to a standard of living adequate for the health and well-being of himself and his family, including, food, clothing, housing and the right to security in the event of unemployment, sickness, disability, widowhood, old age, or lack of livelihood in circumstances beyond his control.¹⁵⁸

Paragraph 2 of the article further provides that motherhood and childhood are entitled to special care and assistance and that all children, whether born in or out of wedlock, should enjoy the same social protection.¹⁵⁹ Article 26 of the *UDHR* places an obligation on States to provide education to everyone as it is a fundamental right which everyone is entitled to — especially children — and such right is an empowerment right.¹⁶⁰

The wording "everyone has the right" in article 25 of the *UDHR* clearly shows that everyone, including children, has the right to an adequate standard of living and the State must ensure that this right is protected. Further emphasis on the protection of children is articulated in paragraph 2, and that in situations where parents or family are unable to offer protection, the State must take steps to assist and ensure the protection.

The United Nations Assembly later adopted a new *Declaration of the Rights of the Child* in 1959.¹⁶¹ This *Declaration* urged national governments to recognise the rights outlined in the *Declaration* and thus strive for their observance. The 1959

¹⁵⁷ See the Preamble of the *Universal Declaration of Human Rights* (1948) (hereinafter *UDHR*).

¹⁵⁸ Art 25(1) of the *UDHR*.

¹⁵⁹ Art 25(2) of the *UDHR*.

¹⁶⁰ Art 26 of the *UDHR*.

¹⁶¹ UNGA, *Declaration of the Rights of the Child*, A/RES/1386(XIV) (20 November 1959) (hereinafter the 1959 *Declaration*).

Declaration went further than its 1924 predecessor, which did not contain explicit reference to the obligations of States. It is also the first human rights instrument to explicitly provide extensive recognition of children's rights. It comprises 10 principles,¹⁶² and one of the key principles in the 1959 *Declaration* is that a child is to enjoy "special protection" as well as "opportunities and facilities, by law and by other means", for healthy and normal physical, mental, moral, spiritual, and social development "in conditions of freedom and dignity."¹⁶³

The paramount consideration in enacting laws for this purpose is the best interests of the child principle, which is a standard echoed throughout legal instruments on children's rights.¹⁶⁴ Amongst the other principles in the *Declaration*, a child is entitled to a name and nationality, adequate nutrition, housing, recreation, and medical services, and education (and for the handicapped — special treatment, education, and care).¹⁶⁵ Other principles concern the protection against neglect, cruelty, exploitation, trafficking, underage labour, and discrimination.¹⁶⁶

Notably, the term "principle" is preferred to "rights". This appears to acknowledge the *Declaration's* aspirational nature as it was given substantial moral weight through its unanimous adoption by the General Assembly.¹⁶⁷ Although it is seen as outdated in some respect, according to Buck, the *Declaration* is indisputably an important step in the development of children's rights, signifying the child's transition from a "passive recipient of humanitarian aid" to "active participative" in the human rights system.¹⁶⁸

It is submitted that the 1959 *Declaration* appears to address the position of children in a more elaborative manner than its 1924 predecessor. According to Buck, the 1924 *Geneva Declaration* considered children to be objects of international law,

¹⁶² The 1959 *Declaration* comprises of ten principles, which include, *inter alia*, a child's entitlement to a name and nationality; growth and development in health; adequate nutrition, housing, recreation and medical services, and to education.

¹⁶³ Principle 2 of the 1959 *Declaration*.

¹⁶⁴ Principle 2 of the 1959 *Declaration*.

¹⁶⁵ Principles 3, 4, 5 and 7 of the 1959 *Declaration*.

¹⁶⁶ Principles 8, 9 and 10 of the 1959 *Declaration*.

¹⁶⁷ This was on 20 November 1959.

¹⁶⁸ Buck *International Law* 48.

whereas the 1959 *Declaration* acknowledged children as subjects of international law with entitlements.¹⁶⁹ These entitlements were, however, limited to economic and social matters and did not address the civil and political rights of children.¹⁷⁰ It is noteworthy that the *Declaration* was a non-binding resolution that was not binding as such, however, it had a significant moral value in enhancing the rights of children.

3.2.3 *International Covenant on Economic, Social and Cultural Rights (1966)* (*ICESCR*)

The *ICESCR* deals specifically with economic, social, and cultural rights and it is the main international legal instrument protecting and promoting socio-economic rights.¹⁷¹ The *ICESCR* was adopted on 16 December 1966 and entered into force on 3 January 1976. As of 2020, the *ICESCR* has 171 parties, including South Africa (which ratified the *ICESCR* in January 2015 and came into force on 12 April 2015).¹⁷²

The economic, social, and cultural rights encapsulated in the *ICESCR* are based on a perspective according to which people can simultaneously enjoy rights, freedoms, and social justice. Accordingly, protection of social, economic, and cultural rights has been deemed necessary as the right to live a dignified life can never be fulfilled unless all the basic necessities of life (as enshrined in the *ICESCR*, such as work, food, housing, health care, education, and culture) are adequately and equitably available to everyone.¹⁷³

The *ICESCR* also provides for State obligations in its implementation of economic, social, and cultural rights, specifically in article 2(1) of the *ICESCR*:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant

¹⁶⁹ Buck *International Child Law* 22.

¹⁷⁰ Buck *International Child Law* 22.

¹⁷¹ *International Covenant on Economic, Social and Cultural Rights* Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976, in accordance with art 27.

¹⁷² UN 2021 <https://indicators.ohchr.org/>.

¹⁷³ The Committee on Economic, Social and Cultural Rights *Fact Sheet No 16 (Rev 1)* note 1. See also Correa 2015 *Brazilian Journal of International Law* 336.

by all appropriate means, including particularly the adoption of legislative measures.

Article 2(1) provides that economic, social, and cultural rights should be realised progressively, depending on the maximum available resources of a given State.¹⁷⁴ Consequently, the obligation is not immediate in nature as it aims to "take deliberate, concrete targeted steps" and to move forward progressively.¹⁷⁵ However, a treaty, as outlined by Coomans and the Committee, does require States to undertake certain immediate obligations, including to the "minimum essential level" of each economic, social, and cultural rights and that:

The rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status¹⁷⁶

Furthermore, article 2 imposes an obligation relating to conduct and result that can be further classified into three State obligations.¹⁷⁷ These include (1) the obligation to respect (meaning to refrain from the interference of the enjoyment of the right); (2) the obligation to protect (from the third party); and (3) the obligation to fulfil (to facilitate and provide).¹⁷⁸

States, however, do not exist in isolation. In terms of General Comment No 3, as members of the community of States, they are dependent on international cooperation to cope with problems that go beyond their national borders.¹⁷⁹

Similar to the *UDHR*, article 11 of the *ICESCR* provides for

the right to everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing and to the continuous improvement of living conditions¹⁸⁰

¹⁷⁴ Art 2(1) of the *ICESCR*.

¹⁷⁵ Art 2(1) of the *ICESCR*.

¹⁷⁶ Coomans 2011 *HRLR* 7; UN Committee on Economic and Social Rights, General Comment No 3 *The nature of States parties' obligations*, (Art. 2, Para 1 of the Covenant) E/1991/23 (1990) (hereinafter General Comment No 3) para 10. See also Art 2 of the *ICESCR*.

¹⁷⁷ General Comment No 3 para 33.

¹⁷⁸ General Comment No 3 paras 4, 5 and 6. See also Alston and Quinn *Human Rights Quarterly* 164-165.

¹⁷⁹ General Comment No 3 para 13.

¹⁸⁰ Art 11 of the *ICESCR*.

As a result, the State will take appropriate steps to ensure the realisation of this right, recognising to this effect the essential importance of international cooperation based on free consent.¹⁸¹ Article 10 of the *ICESCR* provides for the protection and assistance of families, as well as special measures and protection of children. Article 10(1), therefore, stipulates that

the widest and possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for care and education of dependent children.¹⁸²

Article 10(2) further provides a similar provision to the one in the *UDHR* and stipulates that

special measure of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions.¹⁸³

It further provides that children and young persons should be protected from social and economic exploitation.¹⁸⁴ The articles in the *ICESCR* establish the fact that States have an obligation to ensure the progressive realisation of the socio-economic rights of all children, including those of children in the street situation.¹⁸⁵ Thus, if States are unable to do so, they must seek international assistance from other State Parties. Certain socio-economic rights of children must, however, be

¹⁸¹ Art 11 of the *ICESCR*.

¹⁸² Art 10(1) of the *ICESCR*.

¹⁸³ Art 10(2) of the *ICESCR*.

¹⁸⁴ Art 10(2) of the *ICESCR*.

¹⁸⁵ Although the *ICESCR* does not specifically say so, this is implied as the obligation by the State to ensure progressive realisation of the socio-economic rights of all children extends to street children, hence the usage of the phrase "everyone [...]".

realised immediately, such as the child's right to health¹⁸⁶ and education¹⁸⁷ as stipulated by the Covenant.

3.2.4 *International Covenant on Civil and Political Rights (1966) (ICCPR)*

The *ICCPR* was adopted by the UN General Assembly together with the *ICSECR* and came into force on 23 March 1976, in accordance with article 49.¹⁸⁸ The *ICCPR* enjoys the ratification of 173 State Parties, including South Africa (which ratified the *ICCPR* in December 1999 and entered into force in 1999).¹⁸⁹

The purpose of the *ICCPR* is to create conditions whereby everyone may enjoy his or her civil and political rights.¹⁹⁰ It further establish and retain an order where human beings can live as their inherent dignity requires and to supplement the existing domestic means for the observance of the right by making them enforceable by other State Parties and by monitoring bodies which the treaty may have established.¹⁹¹

The nature of the obligation of State Parties is imposed under article 2(1) of the *ICCPR* and provides that

[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights

¹⁸⁶ UN Committee on Economic and Social Rights, General Comment No 14 *The Right to the Highest Attainable Standard of Health* (Art 12), E/C.12/2000/4 (2000): "The right to the highest attainable standard of health" para 20 notes that "[w]hile the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes on States parties' various obligations which are of immediate effect. States parties have immediate obligations in relation to the right to health, such as the guarantee that the right will be exercised without discrimination of any kind (art 2.2) and the obligation to take steps (art 2.1) towards the full realization of [art] 12. Such steps must be deliberate, concrete and targeted towards the full realization of the right to health".

¹⁸⁷ UN Committee on Economic and Social Rights, General Comment No 13 *The Right to Education* (Art 13), E/C.12/1999/10 (199) (Twenty-first session, 1999) (hereinafter General Comment No 13); "[t]he right to education" (art 13 of the *Covenant*) provides that "States parties have immediate obligations in relation to the right to education, such as the "guarantee" that the right "will be exercised without discrimination of any kind" (art 2(2)) and the obligation "to take steps" (art 2(1)) towards the full realization of art 13".

¹⁸⁸ *International Covenant on Civil and Political Rights* (1966) adopted and opened for signature, ratification and accession by GA Res 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with art 49.

¹⁸⁹ UN 2021 <https://indicators.ohchr.org/>. See also Howie 2018 *IJSLP* 14.

¹⁹⁰ Haxhiraj 2013 *Juridical Tribune* 311.

¹⁹¹ Haxhiraj 2013 *Juridical Tribune* 311.

recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status¹⁹²

The obligations accepted by State Parties, as Haxhiraj points out, are to respect and ensure the rights recognised in the *ICCPR*.¹⁹³ The duty to respect is negative in nature because it orders State Parties to refrain from restricting the enjoyment of the right where limitations are not provided for.¹⁹⁴ Ideally, States undertake to "respect and ensure" all of the *ICCPR*'s rights to all "individuals within its territory and subject to its jurisdiction".¹⁹⁵ This obligation suggests that the State Parties should act with "due diligence" to take appropriate steps to prevent, punish, investigate, and redress harm to citizens.¹⁹⁶

Under article 2(3), State Parties undertake to ensure that a person whose rights are violated has an effective remedy and that a person claiming such remedy has his or her right determined by competent authorities provided by the State's legal system.¹⁹⁷ State Parties also undertake to develop the possibilities of judicial remedies to ensure that those remedies are enforced.¹⁹⁸ The duty to ensure a positive dimension means that the creation of conditions whereby everyone may enjoy their civil and political right requires something more than just the obligation of the State to abstain from encroaching upon the right guaranteed to everyone.¹⁹⁹

Article 6 of the *ICCPR* stipulates that every human being has the right to "inherent life". Accordingly, this right is protected by law and no one "shall be arbitrarily deprived" of his right to life.²⁰⁰ The phrase "every human" suggests that this right is also extended to children, particularly children in the street situation, as their right to life is often violated on the street (own emphasis). Article 7 further stipulates that no one shall be subjected to torture or cruel, inhumane, or degrading treatment or

¹⁹² Art 2(1) of the *ICCPR*.

¹⁹³ Haxhiraj 2013 *Juridical Tribune* 311.

¹⁹⁴ Art 2, para 1 of the *ICCPR*.

¹⁹⁵ Art 2, para 1 of the *ICCPR*.

¹⁹⁶ Art 2, para 1 of the *ICCPR*.

¹⁹⁷ Art 2(3) of the *ICCPR*.

¹⁹⁸ Art 2(3) of the *ICCPR*. See also Haxhiraj 2013 *Juridical Tribune* 311-312.

¹⁹⁹ Art 2(3) of the *ICCPR*.

²⁰⁰ Art 6 of the *ICCPR*.

punishment.²⁰¹ Furthermore, articles 9 and 10 outline the rights of "anyone" who is alleged to have been in conflict with the law and the rights afforded to that person thereof, including child offenders.²⁰²

Article 24 specifically outlines the civil rights of the child, and article 24(2) provides the right to be registered immediately after birth and the right to a name.²⁰³ Paragraph 3 of the same article states that every child has the right to acquire a nationality.²⁰⁴ Clearly, the drafters, in my opinion, acknowledge the importance of children to identify themselves. In many countries, including South Africa, many children do not have access to their birth certificates²⁰⁵ and this is an issue that needs to be addressed by government departments dealing with children.

The *ICCPR* creates an obligation on State Parties to protect and promote the civil and political rights of children, including children in the street situation. The obligation of State Parties should be read in accordance with article 2 of the *ICCPR* regarding the realisation of civil and political rights of children in their respective countries.

3.2.5 *The United Nations Convention on the Rights of the Child (1989) (CRC)*

In 1989, the United Nations Assembly unanimously adopted the *United Nations Convention on the Rights of the Child (1989) (CRC)* after 10 years of deliberations.²⁰⁶ It was developed to establish universally acceptable and applicable standards on the protection and promotion of children's rights.²⁰⁷ The *CRC* is the most comprehensive international instrument on the rights of the child. To date, the *CRC* has been ratified by 196 States, including South Africa (which ratified the *CRC*

²⁰¹ Art 7 of the *ICCPR*.

²⁰² Art 9 of the *ICCPR*.

²⁰³ Art 24(2) of the *ICCPR*.

²⁰⁴ Art 24(2) of the *ICCPR*.

²⁰⁵ See Proudlock and Martin *Children's Rights to Birth Registration: A review of South Africa's Law 13*; see also *Centre for Child Law v Director: Department of Home Affairs and Others* (2021).

²⁰⁶ Theis 2018 https://bettercarenetwork.org/sites/default/files/CPC_State-Intl-Children-Rights_Final-1.pdf at 6.

²⁰⁷ Theis 2018 https://bettercarenetwork.org/sites/default/files/CPC_State-Intl-Children-Rights_Final-1.pdf at 6.

on 16 June 1995).²⁰⁸ The *CRC* is a legally binding instrument and all State Parties who are members thereto are obliged to amend their legislation to accommodate the provisions of the *CRC* and to commit themselves to the implementation of the *CRC* in their countries.²⁰⁹ It is the first international treaty to list the full range of civil, political, economic, social, and cultural rights belonging to children.

The *CRC* is based on the four cardinal principles.²¹⁰ These include the non-discrimination principle (article 2), which provides that all children have the right to be treated equally as without discrimination.²¹¹ The best interests of the child principle (article 3) stipulates that the best interests of all children must be a primary consideration in all matters that affects them by parents, guardians caregivers, lawmakers, policymakers, welfare institutions, and those who influence or control resource allocation, including decisions throughout government, parliament, and the judiciary.²¹²

The right to survival and development principle (article 6) urges State Parties to ensure the survival and development of all children.²¹³ The participation or views of the child principle (article 12) is a right and a practical imperative; the opinions of children are important in informing policies, plans, and interventions concerning them.²¹⁴

²⁰⁸ From 2021, 196 countries are party to the *CRC*, including every member of the UN except for the United States.

²⁰⁹ The History of Children's Rights in Kosher, Ben-Arieh and Hendelsman *Children's Rights and Social Work* 15; Buck *International Child Law* 121.

²¹⁰ Art 2 provides that "State parties shall respect and ensure the rights set forth in the present convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's parents or legal guardian, race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, poverty, disability, birth or other status". Art 3.1 provides that "[i]n all actions concerning children whether undertaken by public or private social welfare institution, court of law, administrative authorities or legislative bodies, the best interest of the child of the child shall be a primary consideration". Art 6.2 provides that "State parties shall ensure to the maximum extent possible the survival and development of the child". Art 12 provides that "States parties shall assure to the child who is capable of forming his or her own views the rights to express those views freely in all matters affecting the child, the view of the child been given due weight in accordance to the age and maturity of the child".

²¹¹ Art 2 of the *CRC*.

²¹² Art 3 of the *CRC*; see General Comment No 5.

²¹³ Art 6 of the *CRC*.

²¹⁴ Art 12 of the *CRC*; UN Convention on the Rights of the Child, General Comment No 12 *The right of the child to be heard*, CRC/GC/2009/12 (20 July 2009).

The *CRC* does not explicitly mention the term "street children" or "children in the street situation". This is because the focus of the *CRC* is to guarantee the rights of all children. However, the Committee on the Rights of the Child requires that Member States with a large population of children in the street situation should report specifically on the progress regarding improvements on children in the street situation.²¹⁵

In 2017, General Comment No 21 (on children in the street situation) was developed by the Committee to provide authoritative guidance to States on developing comprehensive, long-term national strategies on children in street situations using a holistic child rights approach and addressing both prevention and response in line with the *CRC*.²¹⁶

According to the Committee, all children, including children in the street situation, should enjoy the following rights:

(a) *The right to life*

The right to life is an inherent right that every human being is entitled to regardless of his or her gender or age. Article 6(1) of the *CRC* stipulates that State Parties should recognise that every child has the inherent right to life.²¹⁷ Article 6(2) further stipulates that State Parties must "ensure to the maximum extent possible the survival and development of the child".²¹⁸ The right to life, like in article 6(1) of the *ICCPR*, is the only right in the *Convention* described as an "inherent life".

Buck asserts that some commentators take the view that this is one of the "peremptory norms of general international law", meaning that the *jus cogens*

²¹⁵ The Committee is an independent international body which supervises the application of the *CRC* by the member states. By complying with the *CRC*, the State Parties agree to engage in in a dialogue with this Committee and assume a legal obligation to submit periodic "State reports" outlining the legislative, judicial, administrative and other measures they have taken to ensure the enjoyment of the rights contained in the *CRC*. However the Committee on the Rights of the Child is established to monitor the implementation of the *CRC* by State Parties. See General Comment No 21 paras 2 and 9

²¹⁶ General Comment No 21 para 2.

²¹⁷ Art 6(1) of the *CRC*.

²¹⁸ Art 6(2) of the *CRC*.

comes to play.²¹⁹ However, the right to life differs from the *ICCPR* in major human rights treaties, as it additionally requires States to ensure "to the maximum extent possible" the child's "survival and development".²²⁰ Clearly, the right to life entails refraining from jeopardising the life and development of children or from subjecting them to physical or moral threats.

General Comment No 21 (on children in street situations) emphasises the fact that children in the street situation are at risk of extrajudicial killings by State agents; murder by adults or peers (including murders linked to the so-called vigilante justices); death due to lack of nutrition, health, and shelter to name but a few.²²¹ The Committee published General Comment No 36 (2018) on article 6 of the *ICCPR*, on the right to life in 2018.²²² It stated that the "right to life should not be interpreted narrowly".²²³ It concerns an individual's entitlement to be free from acts and omissions intended or expected to cause their unnatural or premature death and to enjoy a life with dignity.²²⁴

As a result, States have an obligation to respect the dignity of children in the street situation and their right to life, survival, and development by refraining from State-led violence and by decriminalising survival behaviour and status offences, and protecting children in the street situation from harm caused by third parties.²²⁵ Furthermore, they must promote and protect their right to life, survival, and development by designing and implementing holistic long-term strategies based on a children's rights approach to secure their development to their full potential.²²⁶

²¹⁹ Buck *International Child Law* 142; art 6(1) of the *ICCPR* states that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life".

²²⁰ Buck *International Child Law* 142.

²²¹ General Comment No 21 para 29.

²²² UN Committee on Civil and Political Rights, General Comment No 36 (on art 6 of the *ICCPR*) *On the right to life*, CCPR/C/GC/36 (2018), adopted by the Committee at its 124th session (8 October to 2 November 2018) (hereinafter General Comment No 36).

²²³ General Comment No 21 para 29.

²²⁴ Buck *International Child Law* 143. See also Human Rights Committee, General Comment No 6 *Article 6 (Right to Life)*, HRI/GEN/1/Rev.8 (1982) para 5.

²²⁵ General Comment No 21 para 33.

²²⁶ General Comment No 21 para 33.

It is thus important that the right to life of all children — including children in the street situation — is protected and treated in a manner that does not violate their right to life.

(b) The right to an adequate standard of living

Article 27 of the *CRC* provides for the right of the child to an adequate standard of living. Article 27(1)²²⁷ is complemented by the recognition in article 27(2) that parents have the "primary responsibility" to secure living conditions necessary for a child's development.²²⁸ In turn and in terms of article 27(3), the State is to

take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.²²⁹

Article 27 is not very clear regarding the division of responsibility between the parents and the State nor the allocation of responsibility for the child's development when the child is not in the care of the parents but rather somebody else or even on the streets. Such gaps, according to Eide, have to be filled by reference to other provisions of the *CRC*, in particular articles 5 and 18,²³⁰ and other international instruments (including article 24 of the *ICCPR*,²³¹ and article 10 of the *ICESCR*,²³² as discussed above) and by the evolving practices of the *CRC* Committee.²³³

In relation to children in the street situation, as mentioned in chapter 2, the standard of living — particularly poverty — is one of the main causes of children ending up on the streets. The implementation of article 27 should be in accordance with

²²⁷ Art 27(1) provides that "States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development".

²²⁸ Art 27(2) provides that "[t]he parents of the child or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development"; see also Buck *International Child Law* 197.

²²⁹ Art 27(3) of the *CRC*. See also Taylor "Children's Right to adequate standard of living" 238.

²³⁰ Art 18(1) provides that "States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern".

²³¹ Art 24 of the *ICCPR* outlines the rights of the child; see footnote 176 above.

²³² See footnote 167 above.

²³³ Eide *A Commentary on the United Nations Convention on the Rights of the Child: Article 27 The Right to Adequate Standard of Living* 8.

national conditions and within the means of State Parties' available resources and where needed, within the framework of international cooperation, with particular regard to the obligations of the States to fulfil the minimum core obligation for socio-economic rights.²³⁴

Accordingly, General Comment No 21 states that in terms of material assistance, children in the street situation prioritise the need for

safe place to live, food and free and accessible medical care and education, through State support to parents and caregivers, particularly in relation to subsidized, adequate housing and income generation.²³⁵

Therefore, the State must provide material assistance and support programmes that must be directly linked to children. This is particularly relevant to children in the street situation with non-existence or abusive family connections. This direct assistance must be provided either by the State or via State support to NGOs.

(c) The right to education

There is a high percentage of children in the street situation who do not achieve an educational level that will empower them and ensure them sufficient work with appropriate pay.²³⁶ This contravenes article 28(1) of the *CRC*, which stipulates that State Parties recognise the right of the child to education, intending to achieve this right progressively and based on equal opportunities; State Parties shall in particular:

"(a) Make primary education compulsory and available free to all".²³⁷

Education is an empowerment right and thus helps to develop the child's character. Therefore, article 29(1) of the *CRC* set forth that State Parties agree that the education of the child shall be directed to

²³⁴ General Comment No 21 para 49.

²³⁵ General Comment No 21 para 49.

²³⁶ See Dladla and Ogina *SAJE* 3 – 4.

²³⁷ Art 28 of the *CRC*.

the development of the child's personality, talents and mental and physical abilities to their fullest potential.²³⁸

The various aims of education upon which State Parties agree as contained in articles 29(1)(a)-(e) have been given a detailed commentary by the Committee in General Comment No 1.²³⁹ The General Comment states that this provision is "of far reaching importance" and that the aims of education "are all linked directly to the realisation of the child's human dignity and rights".²⁴⁰ In particular, the General Comment states:

Article 29 (1) not only adds to the right to education recognized in article 28 a qualitative dimension which reflects the rights and inherent dignity of the child; it also insists upon the need for education to be child-centred, child-friendly and empowering, and it highlights the need for educational processes to be based upon the very principles it enunciates.²⁴¹

The Committee also urges State Parties to consider and understand the critical importance of education and implementing children's rights specifically in early childhood.²⁴²

Zain Al-Dien argues that children in the street situation's lack of access to education is a "violation of their fundamental human right and that good quality education is a must" especially for programmes that are interventionist such as those designed for children at risk.²⁴³ Similarly, the World Health Organisation (WHO) states that educating children in the street situation involves helping them acquire knowledge, skills, and attitudes in specific areas of need. General Comment No 21 further emphasises that accessible, free, safe, relevant, and quality education is crucial as it prevents children from ending up in the street situation and fulfilling the rights of children already in the street situation.²⁴⁴

²³⁸ Art 29(1) of the *CRC*.

²³⁹ Committee on the Rights of the Child, General Comment No 1 *Article 29(1) – The Aims of Education*, CRC/GC/2001/1 (17 April 2001) (hereinafter General Comment No 1).

²⁴⁰ General Comment No 1 para 1.

²⁴¹ General Comment No 1 para 2.

²⁴² See UN Committee on Rights of the Child, General Comment No 7 *Implementing child rights in early childhood* (2005) CRC/C/GC/7 para 9.

²⁴³ Zain Al-Dien 2009 *JCIE* 38.

²⁴⁴ General Comment No 21 para 54; see also art 28(1) of the *CRC*.

Furthermore, it is stated that the aim of education for children in the street situation should comply with article 29(1) and include, literacy, numeracy, digital literacy, life skills, child rights education, tolerance for diversity, and citizenship education.²⁴⁵ Ideally, such education is vitally important for the fulfilment of children's rights "to protection, development and participation", including strengthening their autonomy and empowering them to better negotiate situations of risk, to prevent children from ending up in the street and for those who are already in the street situations.²⁴⁶

The Committee notes that this right cannot be achieved overnight and may be realised "progressively" due to limited available resources.²⁴⁷ However, States are also imposed with various obligations which are of immediate effect.²⁴⁸ State Parties have an obligation to take measures to provide good quality education, free child rights education, and life skills universally to all children, through the school curriculum and through non-formal and street education, to reach out-of-school children.²⁴⁹

(d) The right to health and access to health services

Article 24(1) of the CRC provides:

State Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. State Parties shall strive to ensure that no child is deprived of his or her right to access to such health care services.²⁵⁰

Committee on the Rights of the Child, General Comment No 14 *the Right of the child to enjoyment of the highest attainable standard of health* further contends the normative content of the right to health in article 24:

²⁴⁵ General Comment No 21 para 55; see also art 29(1) of the *CRC*.

²⁴⁶ General Comment No 21 para 55.

²⁴⁷ Art 28 of the *CRC*. See also s III of Vienna Declaration and Programme of Action (1993) *Fact Sheet No 10 The Rights of the Child*; see General Comment No 13 para 43.

²⁴⁸ See General Comment No 13 para 43. State Parties have immediate obligation in relation to the right to education, such as the "guarantee" that the right "will be exercised without discrimination of any kind" and the obligation "to take steps" towards the full realisation of art 13.

²⁴⁹ See General Comment No 21 para 55.

²⁵⁰ Art 28(1) of the *CRC*.

The notion of 'the highest attainable standard of health' takes into account both the child's biological, social, cultural and economic preconditions and the State's available resources, supplemented by resources made available by other sources, including non-governmental organisations, the international community and the private sector.²⁵¹

The right to health gives rise to set freedoms and entitlements. According to Buck, the freedoms, which are of increasing importance in accordance with the growing capacity and maturity of the child, include the right to control one's health and body, including sexual and reproductive freedom to make responsible choices.²⁵²

These specific rights also extend to children in the street situation. Additionally, the entitlements include access to a range of facilities, goods, services, and conditions that provide equal access to range of facilities, good services, and conditions that provide equality of opportunity for every child to enjoy the "attainable standard of health" as outlined in General Comment No 14.²⁵³

Ideally, the *CRC* promotes justice by expecting that State Parties should not leave their children to be neglected and unhealthy, whilst some have privileged standards of health.²⁵⁴ Alderson states that every child should be able to enjoy the "highest attainable standard of health", which that State should support.²⁵⁵ So far, there is still a major gap regarding the "highest attainable standard of health" between the wealthier or minority worlds and poorer worlds.²⁵⁶ Wealthier States can support much higher standards of living and health whilst poorer States cannot.

As pointed out in chapters one and two of this paper, the street environment can increase vulnerability regarding physical and mental health issues. These bring about challenges, which include disproportionately high rates of substance abuse, HIV and other sexually transmitted infections, pregnancy, violence (including the

²⁵¹ Committee on the Rights of the Child, General Comment No 14 *The Right of the child to enjoyment of the highest attainable standard of health (Art 24)* CRC/C/GC/14 (2000) (hereinafter General Comment No 14) para 23.

²⁵² Buck *International Child Law* 190.

²⁵³ General Comment No 14 para 23.

²⁵⁴ Alderson *Health and Children's Rights* 2.

²⁵⁵ Alderson *Health and Children's Rights* 2.

²⁵⁶ Alderson *Health and Children's Rights* 2. See also de Benitez *Still on the Street – Still Short of Rights* 16.

one amongst peers), suicidal thoughts, medicating with unregulated medicines, and exposure to infections.²⁵⁷

Children in the street situation are often deprived of their right to access health care services and are discriminated against, which renders them unable to seek medical attention when in dire need.²⁵⁸ This clearly indicates a gap between children in the street situation and those in better situations regarding every child's opportunity to enjoy the "highest attainable standard of health".²⁵⁹

States have an obligation to realise or achieve this particular right "immediately" and ensure that every child benefits without discrimination and have access regardless of physical location or social status.²⁶⁰ In instances where resources are not immediately available, article 24(4) of the *CRC* clearly promotes justice through advocating "international co-operation to archive the health-related rights particularly in developing countries".²⁶¹

(e) The right to protection

Chapter two of this paper demonstrates that emotional, physical, or sexual violence against children is a fundamental cause and a consequence of children ending up in the street situation.²⁶² Consequently, once on the street, the conditions to which these children are exposed violate their human rights — especially considering the fact that they are a vulnerable group in need of care and protection. Children in the street situation are constant victims of violence, maltreatment, sexual abuse or exploitation, and neglect. Article 19 of the *CRC* guarantees the protection of children from all forms of violence. Paragraph 1 of this article provides:

States parties shall take all appropriate legislative, administrative, social and educational measures to protect the children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or

²⁵⁷ See para 2.3 above.

²⁵⁸ Painter-Brick 2002 *Annual Review of Anthropology* 159-60.

²⁵⁹ Alderson *Health and Children's Rights* 2 – 3.

²⁶⁰ Art 24(4) of the *CRC*.

²⁶¹ Art 24(4) of the *CRC*.

²⁶² See para 2.4 above.

exploitation, including sexual abuse, while in the care of the parent(s), legal guardian(s) or any other person who has the care of the child.²⁶³

Paragraph 2 further provides:

Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instance of child maltreatment described heretofore, and, as appropriate, for judicial involvement.²⁶⁴

Article 19, as cited by Buck in his book, has been given further focus in General Comment No 13 issued in 2011,²⁶⁵ with the stated rationale that "the extent and intensity of violence exerted on children is alarming".²⁶⁶ The Committee acknowledges the link between article 19 and the *OPSC*, but "the Committee holds that Article 19 forms the core provision for discussion and strategies to address and eliminate all forms of violence in the context of the Convention broadly".²⁶⁷ Moreover, General Comment No 21 provides that specific, immediate, and urgent measures need to be taken to protect children in the street situation.²⁶⁸

Additionally, articles 34 and 36 provide for the protection against sexual abuse, sexual exploitation, trafficking, and other exploitation; thus State Parties must respond appropriately to prevent such from happening.²⁶⁹ Children in the street situation, as already discussed, are vulnerable to sexual abuse and exploitation and the *OPSC* is particularly relevant to them.²⁷⁰

In cases where children in the street situation are in conflict with the law, article 37 provides that State Parties must ensure that those children are not subject to inhumane treatment, deprived of their liberty, and must be treated with humanity

²⁶³ Art 19(1) of the *CRC*.

²⁶⁴ Art 19(2) of the *CRC*.

²⁶⁵ UN Committee on the Rights of the Child, General Comment No 13 *The Right of the Child to freedom from all forms of violence*, CRC/C/GC13 (2011) (hereinafter CRC/C/GC13). See also Buck *International Child Law* 176.

²⁶⁶ CRC/C/GC13 para 2.

²⁶⁷ CRC/C/GC13 para 7.

²⁶⁸ General Comment No 21 paras 57-60.

²⁶⁹ Art 34 of the *CRC*.

²⁷⁰ General Comment No 21 para 58.

and respect and have access to legal representation.²⁷¹ Article 40 further stipulates the provision of the appropriate and humanitarian conditions of the detention that protects the child's dignity.²⁷²

In order to realise children's rights under articles 19, 34 and 36 of the *CRC*, the State must make available all preventive measures and have measures in place to respond to the maltreatment of children, especially children in the street situation. At the individual level, child protection involves a choice of measures and other decisions as article 3(1) requires the best interests of the child to be "a primary consideration".

The best interests of the child (as cited by Falch-Eriksen and Backe-Hansen) give direction to the professional judgment to be exercised at all levels of these cases involving a violation of children's rights.²⁷³

3.2.5.1 Implementation of the CRC

Article 4 of the *CRC* provides that in order to promote and protect the rights in the *CRC*, State Parties must take all appropriate, legislative, administrative, and other measures to implement these rights.²⁷⁴ General Comment No 5 was developed to assist State Parties to perform their implementation duties by ensuring that the domestic legislation complies with the principles and provisions of the *CRC* and that the provisions in domestic legislation are enforceable.²⁷⁵

There is a need for active measures to be taken by State Parties in ensuring that the principles and provisions of the *CRC* are well-known to everyone and inclusive of children and adults in the State when implementing the *CRC*.²⁷⁶ Given the fact that in the past children were not always bearers of rights, this measure ensures

²⁷¹ Art 37 of the *CRC*.

²⁷² Art 40 of the *CRC*; See also UN Committee on the Rights of the Child, General Comment No 24 *Children's Rights in Juvenile Justice*, CRC/C/GC/24 (2019) (hereinafter General Comment No 24); Skeleton and Tshehla *International instruments pertaining to child justice in South Africa* 17.

²⁷³ Falch-Eriksen and Backe-Hansen *Human Rights in Child Protection* 33-34.

²⁷⁴ Art 4 of the *CRC*.

²⁷⁵ See General Comment No 5 para 1.

²⁷⁶ See art 42 of the *CRC*.

that the implications of the *CRC* are known to everyone.²⁷⁷ If children and adults are not made aware of these implications it may pose a risk of failing to recognise the rights of children as outlined in the *CRC*.²⁷⁸

State Parties have an obligation to make their periodic reports available to the public within their jurisdiction.²⁷⁹ This makes it easier to promote awareness of the principles of the *CRC*. The reporting process is important because the periodic report must be made available at the national level in order to increase the chances of them having a substantial impact on children's lives.²⁸⁰

It is provided in article 4 that with regard to economic, social, and cultural rights, State Parties shall undertake such measures to the "maximum extent of their available resource". This presupposes that the *CRC* Committee member States acknowledges that some provisions involve a longer process to implement in the State's jurisdiction due to a lack of available resources or financial constraints. This includes the right to health care and the right to education being the only rights that must be "progressively realised".²⁸¹ State Parties have an obligation to give priority to children by allocating the "maximum available" resources for the implementation of the principles and provisions under the *CRC*, irrespective of the State's limited finances.²⁸²

3.2.6 The three Optional Protocols to the Convention

(a) Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (OPSC)

²⁷⁷ General Comment No 5 para 66.

²⁷⁸ General Comment No 5 para 66.

²⁷⁹ Art 44(6) of the *CRC*.

²⁸⁰ General Comment No 5 para 71.

²⁸¹ See arts 28(1) and 24(4) of the *CRC*.

²⁸² Section III of Vienna Declaration and Programme of Action (1993) *Fact Sheet No 10 The Rights of the Child*.

The *OPSC* was adopted in 2000 and entered into force on 18 January 2002.²⁸³ It aims to better achieve the implementation of various provisions of the *CRC* relating to the prevention of a range of social and economic forms of exploitation.²⁸⁴ The *OPSC* was drafted to ensure the criminalisation of certain behaviours and better provide for the protection of the child victim.²⁸⁵

Article 2 defines the conduct prohibited in the protocol, and article 3 lists the acts that, as a minimum, should be covered by the criminal laws of State Parties.²⁸⁶ For example, article 2(1) of the *OPSC* defines "sale of children" to mean

any act or transaction whereby a child is transferred by any person or group of persons to another, for, for remuneration or any other consideration.²⁸⁷

Moreover, in article 3 of the *OPSC*, an act to attempt to commit, complicate or participate in acts relating to the sale of children should be criminalised.²⁸⁸ Children in the street situation are particularly vulnerable to sexual violence and exploitation, and the *OPSC* is particularly relevant to them.²⁸⁹ Furthermore, as outlined in General Comment No 21, children may end up in the street situation through trafficking for sexual or labour exploitation, and/or may be vulnerable to such trafficking, as well as trafficking for body parts, and other forms of exploitation once on the street.²⁹⁰

The State has an obligation to take the necessary measures to establish jurisdiction over the offences as defined in the protocol, when the offences are committed in its territory, or when the offender or victim is a national of that State.²⁹¹

²⁸³ Optional Protocol to the *Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* (2000) adopted and opened for signature, ratification and accession by GA Res A/RES/54/263 of 25 May 2000 entered into force on 18 January 2002.

²⁸⁴ See Preamble of the *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* (2000). South Africa ratified the *OPSC* IN 2003.

²⁸⁵ Arts 2 and 3 of the *OPSC*.

²⁸⁶ Buck *International Child Law* 108. See also Mezmur The United Nations on the Rights of the Child in *Child Law in South Africa* 420.

²⁸⁷ Art 2(1) of the *OPSC*.

²⁸⁸ Art 3 of the *OPSC*.

²⁸⁹ General Comment No 21 para 58.

²⁹⁰ General Comment No 21 para 58.

²⁹¹ General Comment No 21 para 58.

(b) Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (OPAC)

Buck²⁹² and Mezmur²⁹³ point out that the age at which children should be permitted to participate in armed conflict was an issue of concern during the drafting of the *CRC*. In particular, article 38 was argued to be "inadequate" and the proposal for an optional protocol arose from the first general discussion held by the *CRC* Committee on "Children in armed conflict" in 1992.²⁹⁴

By 2000, international NGOs, notably the Coalition to Stop Use of Child Soldiers, led the adoption of the *OPAC*, which significantly strengthened the legal norms regarding the use of child soldiers.²⁹⁵ The *OPAC* came into force in 2002, and currently enjoys ratification by 171 State Parties, including South Africa.²⁹⁶

Article 1 of the *OPAC* raises the minimum age of direct participation in hostiles from 15 years to 18 years.²⁹⁷ The minimum age for direct participation in hostilities was set at 15 by the *Additional Protocol* and the *CRC*. The *Additional Protocol II* also sets the standard at 15 but does not make a distinction between direct or indirect participation.²⁹⁸ Furthermore, article 2 of the *OPAC* provides that State Parties

shall ensure persons who have not yet attained the age of 18 are not compulsorily recruited into their armed forces.²⁹⁹

Article 4(1) forbids rebels and other non-governmental armed groups from recruiting persons under the age of 18 years or using them in hostilities under any circumstances.³⁰⁰

²⁹² Buck *International Child Law* 110.

²⁹³ Mezmur *The United Nations Convention on the Rights of the Child* 420.

²⁹⁴ Mezmur *The United Nations Convention on the Rights of the Child* 420. See also art 38 of the *CRC*.

²⁹⁵ Buck *International Child Law* 110; Mezmur *The United Nations Convention on the Rights of the Child* 420.

²⁹⁶ UN 2021 *Children and Armed Conflict* https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-b&chapter=4&clang=_en.

²⁹⁷ Art 1 of the *OPAC*.

²⁹⁸ *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts* (Protocol II).

²⁹⁹ Art 2 of the *OPAC*.

³⁰⁰ Art 4(1) of the *OPAC*.

This optional protocol is relevant as children in the street situation are vulnerable to recruitment into armed forces or armed groups. This is emphasised in General Comment No 21 as "conflict may lead children ending up in the street situation" through the disruption of social networks, family separation, displacement from communities, or rejection of demobilised child combatants from the community.³⁰¹

State Parties have an obligation to "take all necessary legal, administrative and other measures to ensure the effective implementation and enforcement" of the *OPAC*.³⁰² They are also obliged to take all feasible measures "to ensure that persons within their jurisdiction recruited or used in hostilities" contrary to the Protocol are "demobilised or otherwise released from services" and to provide such persons with "appropriate assistance for their physical and psychological recovery and their social reintegration".³⁰³

(c) Optional Protocol to the Convention on the Rights of the child on a Communication Procedure (OPIC)

The third and last optional protocol, *OPIC*, is concerned with the rights of the child on a communication procedure. It entered into force in 2014 and currently enjoys the ratification of 47 State Parties, with Gabon being the only African country to ratify it.³⁰⁴ The *OPIC* is aimed at reinforcing and complementing access-to-justice efforts at the national level, and

to further enhance the implementation of the Convention and where applicable, the Optional Protocol.³⁰⁵

³⁰¹ General Comment No 21 para 61.

³⁰² General Comment No 21 para 61.

³⁰³ General Comment No 21 para 61.

³⁰⁴ UN 2014 *STATUS: 11d Optional Protocol to the Convention on the Rights of the Child on a communications procedure* https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtds_g_no=IV-11-d&chapter=4.

³⁰⁵ See Preamble of *Optional Protocol to the Convention on the Rights of the Child on a communications procedure* (2011) adopted and opened for signature, ratification and accession by GA Res A/RES/66/138 of 19 December 2011, entered into force on 14 April 2014

The *OPIC* is not of particular relevance for the purpose of this research and children in street situations. It is, however, still of significant importance regarding other issues involving children and must be acknowledged as such.

The above discussed optional protocols are important as they complement and add more to the existing treaties, such as the *CRC*. They are used to further address issues in the original treaty, address new or emerging concerns, or add to the procedure for operation and enforcement of the treaty.³⁰⁶ They are "optional" because the obligations may be more demanding than the original convention, so States must independently choose whether or not to be bound by them.

3.2.7 Other international law applicable to children in the street situation

There are also several other important international instruments aimed at protecting children in the street situation, such as dealing with child labour, juvenile justice, and the alternative care of children.

The *Guidelines for the Alternative Care of Children* were developed as a result of the recommendation by the Committee on the *CRC* and adopted by the General Assembly in 2010.³⁰⁷ The purpose of these guidelines is to enhance the implementation of the *CRC* and other international instruments regarding the protection and well-being of children deprived of parental care by guiding policy and practice for the alternative care of children.³⁰⁸

South African courts have also interpreted the constitutional rights and elaborated on the State's obligation concerning children in alternative care.³⁰⁹ When it comes to the right to family care and parental care the *Guidelines* provide that

³⁰⁶ See UNICEF 2021 <https://www.unicef.org/childrightsconvention/strengtheningconventionoptionalprotocols>.

³⁰⁷ UNGA, *Guidelines for the Alternative Care of Children*, A/RES/64/142 (24 February 2010) (hereinafter A/RES/64/142).

³⁰⁸ A/RES/64/142 para 1.

³⁰⁹ Jamieson *Children's Rights to appropriate alternative care when removed from family environment* 220.

States should develop and implement consistent and mutually reinforcing family-oriented policies designed to promote and strengthen parents' ability to care for their children.³¹⁰

This can be done by way of supportive social services by the state to parents and children.³¹¹ Furthermore, concerning the right of children to alternative care, the *Guidelines* assert that the State has the responsibility to ensure planning and coordination and provide that:

It is a responsibility of the State or appropriate level of government to ensure the development and implementation of coordinated policies regarding formal and informal care for all children who are without parental care. Such policies should be based on sound information and statistical data³¹²

These guidelines should also be taken into account by South African government when implementing the rights in the *CRC* and other relevant international instruments in ensuring that the rights of children in the street situation are protected like other children in better situations, especially given that they are a vulnerable group.

The *International Standards on Juvenile Justice*, in terms of articles 37 and 40 of the *CRC*, guides State Parties on the establishment of systems of the juvenile system, in addition to other non-binding instruments governing State law and practice concerning the juvenile system.³¹³ The Committee on the Rights of the Child General Comment No 24 (2019) on the Rights of the Child in Juvenile Justice (this General Comment replaced General Comment No 10 (2007)) brings together the key elements enshrined in these instruments as well as drawing on the Committee's extensive experience in monitoring the implementation of the *CRC*.³¹⁴

Crucially, the General Comment notes that State's approach to juvenile justice should be bound by child rights principles. Children in the street situation are more

³¹⁰ A/RES/64/142 para 33.

³¹¹ A/RES/64/142 para 33.

³¹² A/RES/64/142 para 69.

³¹³ UN *Standards Minimum Rules for the Administration of Juvenile Justice* (1985) (the Beijing Rules); UN *Rules for the Protection of Juveniles Deprived of their liberty* (1990) (Havana Rules); UN *Guidelines for the Prevention of Juvenile Delinquency* (1990) (Riyahd Guidelines).

³¹⁴ UN Committee on the Rights of the Child, General Comment No 10 *Children's Rights in Juvenile Justice*, CRC/C/GC/10 (2007); see General Comment No 24.

likely to be targeted, criminalised, and end up in juvenile or adult justice systems and are less likely to benefit from diversion or restorative practices because they are unable to afford bail or have adults vouch for them.³¹⁵

The Committee is concerned about the application of "zero tolerance" policies criminalising children in the street resulting in force institutionalisation.³¹⁶ These children should not be deprived of their liberty once detained and treated in an inhumane manner by authorities as the provisions of articles 37 and 40 also extend to them.

Child trafficking is prohibited in terms of several international documents and is dealt with specifically in the *United Nations Trafficking in Persons Protocol*.³¹⁷ In terms of article 3 of the *Trafficking Protocol*, child trafficking is defined as

the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation.³¹⁸

Under international law, threat, coercion, deception, and other means are not necessary to meet the threshold of trafficking when a child is involved.³¹⁹ Strict measures must be applied by State Parties in relation to protecting children and preventing trafficking from taking place — especially considering the vulnerability of children in the street situation.

3.2.8 Analysis of international standards

In analysing the international law standards, it is submitted that the principles and provisions represent both the civil and political, and socio-economic rights of children to which every child is entitled.³²⁰ Unfortunately, children in the street situation are not explicitly mentioned in any of the discussed provisions, however,

³¹⁵ General Comment No 21 para 60.

³¹⁶ General Comment No 21 para 60.

³¹⁷ *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children* (2003) (hereinafter the *Trafficking Protocol*).

³¹⁸ Art 3 of the *Trafficking Protocol*.

³¹⁹ Sharma 2015 *IJELH* 140.

³²⁰ See paras 3.2.3 and 3.2.4 above.

notwithstanding this uncertainty, those very provisions are still equally applicable to them as mentioned in General Comment No 21.

This is made clear by the fact that in most of the provisions regarding the rights of children, the wording "every child is" is often used. This suggests that such rights are extended to every child, including children in the street situation. The Committee³²¹ has established the obligations, which rest on States, in terms of international law.

The first obligation refers to respect for children in the street situation's dignity, right to life, survival, and development and protection from harm and violence (caused by State-led and third party violence).³²² Secondly, States must provide material assistance and support programmes that are directly linked to children and enhance their standard of living.

Thirdly, States must take measures to provide good quality education, which is inclusive of every child and this may be realised immediately.³²³ Fourthly, States must progressively protect and promote the right to health and access to health care services so that every child has access to health care services without discrimination.³²⁴ Lastly, States must make available all preventive measures and have mechanisms in place to respond to the maltreatment of children, especially children in the street situation.

Despite the above assertions, I wish to make an argument that, to a certain degree, children in the street situation are still not afforded equal protection or benefit from the enjoyment of rights in their States, as enumerated in the *CRC* and other human rights instruments.³²⁵ Not enough has been done to improve the situation of children in the street situation regarding their survival and development, access to health

³²¹ See General Comment No 21.

³²² See paras 3.2.3 and 3.2.5 above.

³²³ See para 3.2.5 above.

³²⁴ See para 3.2.5 above.

³²⁵ See para 3.2.5 above where I outline the rights of children to health, education and protection by arguing that there is still a lacuna where access of those rights to children in the street situation are concerned.

care services, education, and protective measures. The number of children in the street situation are still increasing even with unclear stats that shows current 150 million children in the street situation.³²⁶ Children in the street situation are still subject to violence on the street by officials and others, and States are not doing much to remove these children from this situation. They continue to be exposed to unhealthy living conditions, which is worsened by the fact that they have limited to no access to health care services.

When drafting policies and conducting research on children in the street situation, the children who are directly affected are often excluded. Often, these decisions made do not necessarily favour these children, especially considering alternative care, health, reasons that brought them to the streets and living conditions.

There is no provision for child participation provided in the existing human rights instruments besides the *CRC* under article 12,³²⁷ 14³²⁸ and 15³²⁹, which are also not clear regarding the participation of children in the street situation. These instruments fail to address the inequalities that often violate the rights of children in the street situation to fully enjoy those rights. This suggests a great gap in the realisation of the rights of children in the street situation, despite the recommendations made by the Committee via General Comment No 21.

In essence, laws, norms, protocols and standards mean little without effective implementation.³³⁰ There is a need to address the shortcomings and challenges that come with implementing the provisions of international law, specifically the *CRC*. On paper, there is too much emphasis on reciting legislative initiatives, and too little detailed scrutiny of the real impacts of legislation on vulnerable children.³³¹

Moreover, despite the significant impact of international law on States regarding the protection and promotion of children's rights, the majority of laws governing child

³²⁶ See para 1.1 above discussing the current stats of children in the street situation.

³²⁷ Article 13 of the *CRC* (freedom of expression).

³²⁸ Article 14 of the *CRC* (freedom of thought).

³²⁹ Article 15 of the *CRC* (freedom of association).

³³⁰ See paras 3.2.3, 3.2.4 and 3.2.5 above.

³³¹

participation exclude the participation of children such as children in the street situation.³³² This has opened room for gaps within legislation and policy conceptualisation in States with high numbers of children in the street situation.

The following section examines international case law and its significance to the rights of children in the street situation. The case articulates State obligation in ensuring that the rights of these children are protected from the constant human rights violations they face on the street.

3.2.9 International case law on children in the street situation

The *Villagran Morales v Guatemala Merits*, IACHR Series C no 63 (1999) IHRL 17 case addresses the plight of children in the street situation in Guatemala.³³³ It refers to the torture and murder of five youth, three of which were minors below the age of 18 years and all children in the street situation. Four of the youth were abducted by heavily armed men, and two were later identified as members of the National Police Force (NPF). The bodies of these children were found discarded in the San Nicholas Woods. Another (fifth) youth, Mr Villagran Morales was shot and killed at Las Casentras Sector of Guatemala City by two men who were identified as members of State Security Force.

Criminal charges were filed in Guatemala against the two police officers implicated in the kidnapping and murder of the victims; however, the said policemen were acquitted after considerable delays during the trial proceedings.³³⁴ In September 1994, the Centre for Justice and International Law (CEJIL) and Casa Alianza presented a petition on behalf of the victims to the Inter-American Commission on Human Rights, in which they alleged that Guatemala violated several provisions in the *Inter-American Convention on Human Rights (IACHR)*.³³⁵

³³²

³³³ *Villagran Morales v Guatemala, Merits*, IACHR Series C no 63, (1996) IACHR 17, IHRL 1446 (IACHR 1999) (hereinafter the *Villagran Morales* case).

³³⁴ *Villagran Morales* para 7; (ref 2810) from the National Police Force to the Judge of the Second Criminal Trial Court referring to the dismissal of Samuel Rocael Valdez Zuniga.

³³⁵ *Villagran Morales* para 5.

The court in this case considered whether the Guatemalan government had violated certain provisions of the *IACHR* such as article 1 (obligation to respect life), article 4 (right to life), article 5 (right to humane treatment), article 7 (right to personal liberty), article 8 (right to a fair trial), article 19 (rights of the child), and article 25 (right to judicial protection) concerning article 1.1.³³⁶

The Court declared that the right to life relating to children in the street situation belongs to the domain of *jus cogens*.³³⁷ The State, as per submission by the Commission, has a positive obligation to protect the right to life and a negative obligation to refrain from arbitrarily depriving its citizen of this right.³³⁸ The Court concluded that the State violated two aspects of the right to life as the event took place where children in the street situation were the subject to different types of persecution including "threats, harassment, torture and murder".³³⁹

The State has the responsibility to respond *sue sponte* with specific investigative measures and actions aimed at punishing and penalising the perpetrator, but the State failed to do so by allowing the perpetrators to escape with impunity.³⁴⁰ This violates the right to life of the children in the street situation and the right to judicial protection and a fair trial for the family of the children in the street situation.³⁴¹ The Court emphasised the importance of the duty of the State in protecting children within their jurisdiction.

In this case only three victims were minors below the age of 18 years and the other two were youth 18 and above. When article 19 of the *IACHR* was considered, its scope thereof created some confusion for the Court as it does not define what is meant by a "child" nor does it define the nature of the protection that is owed to

³³⁶ Art 1.1 of the *IACHR* provides that "[t]he States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons' subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, colour, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition".

³³⁷ *Villagran Morales* para 139.

³³⁸ *Villagran Morales* para 139.

³³⁹ *Villagran Morales* para 142.

³⁴⁰ *Villagran Morales* para 216-217.

³⁴¹ *Villagran Morales* paras 155, 171 and 177.

minors.³⁴² The Court referred to article 1 of the *CRC* as Guatemala is a signatory thereto.³⁴³

Consequently, the Court bypassed the gap as some of the victims were not children; and in its judgment, the Court used the informal expression "street children" to refer to all the five victims in this case — who lived on the street — in a risk situation.³⁴⁴ It is also noteworthy that in its judgment the Court formulated the obligation of the State Parties to the *IACHR* in such circumstances as:

[W]hen States violates the rights of at-risk children, such as 'street children' in this way, it makes them victims of a double aggression. First, such States do not prevent them from living in misery thus depriving them of the minimum conditions for a dignified life and preventing them from the full and harmonious development of their personality [...]. Second, they violate their physical, mental and moral integrity and even their lives.³⁴⁵

In the context of this case and issues relating to children in the street situation, the rights of children are not only violated by the violence and abuse they experience on the street but also by the State's failure to remove these children from the street situation to prevent further harm. The Court noted that children in the street situation represent a vulnerable group of children who require special protection by the State.³⁴⁶

The Court also held that certain provisions in the *CRC* are relevant to children in the street situation, such as article 2 (non-discrimination), article 3(1) (best interests), article 6 (life, survival, and development), article 20(1)(2) (a child deprived of family environment), article 27(1)(3) (adequate standard of living), and article 37 (prohibition of torture and arbitrary deprivation liberty).³⁴⁷

³⁴² *Villagran Morales* para 188; art 19 of the *IACHR* provides that "every child has the right to the measures of protection required by his condition as a minor on the part of his family, society and the State". As already stated in the text above this provision does not specify the age and what a minor or child is, thus creating confusion for the court.

³⁴³ *Villagran Morales* para 188; art 1 of the *CRC* define a child as every human being below the age of 18 "unless by virtue of an applicable law, he shall have attained majority previously".

³⁴⁴ *Villagran Morales* para 188.

³⁴⁵ *Villagran Morales* para 191.

³⁴⁶ *Villagran Morales* para 195.

³⁴⁷ *Villagran Morales* para 195 (these articles were discussed extensively above in discussing the *CRC*, so I will not discuss them here).

The Court found that the State violated articles 1, 4, 5, 7, 8, 19, and 25 of the IACHR in relation to article 1.1 and awarded pecuniary and non-pecuniary damages (reparations) to families of the victims.³⁴⁸ Regarding pecuniary damages, the Court awarded the sum amount of \$508 856, 91 to the victims' next of kin and the *Casa Alianza* and CEJIL (as representatives).³⁴⁹

According to Zarifis, the Villagran *Morales* case establishes an important precedent in the Inter-American legal system for children's rights jurisprudence.³⁵⁰ Moreover, in terms of article 63 of the *IACHR*, a court judgment is legally binding on State Parties, and a study of the Inter-American jurisprudence shows that court decisions serve as valuable authority for future cases.³⁵¹ As such, the decision of the Court in this case serves as a warning to all State who are party member to international instruments, such as the *CRC*, that they may be held responsible for similar crimes perpetrated against children within their jurisdiction.³⁵²

Ideally, this case should make it easier for victims of children's rights violations or abuses to gain fair judgments from the courts across the world, especially when dealing with cases similar cases such to the *Villagran Morales* case.

Beyond the specific remedies awarded by the Court, this judgment should have a lasting impact on the Guatemalan government's enforcement and respect for its human rights obligations.³⁵³ It thus begs the question as to the significance of this case in respect of the promotion and protection of the rights of children in the street situation.

The judgement in this case provides effective litigation before international human rights tribunals as a strategy for protecting the rights of children in the street situation. Ewelukwa argues that international human rights litigation hardly

³⁴⁸ *Villagran Morales et al v Guatemala*, Reparations and Costs, Judgment, Inter-Am. Ct. HR (ser C) No 77 (26 May 2001).

³⁴⁹ *Villagran Morales* para 82 -98.

³⁵⁰ Zarifis 2001 *Human Rights Brief* 3.

³⁵¹ Art 63 of the *IACHR*; see also Zarifis 2001 *Human Rights Brief* 3.

³⁵² Zarifis 2001 *Human Rights Brief* 3-4.

³⁵³ Zarifis 2001 *Human Rights Brief* 3.

addresses the core factors that contribute to the plight of street children and frequently shapes the experiences of children in the street situation.³⁵⁴

Regarding the international law applicable to children in the street situation, this case is significant as it is the first case concerning children in the street situation decided by an international human rights body. Ewelukwa rightly points out that this case suggests that even the most vulnerable groups have access to international human rights tribunals.³⁵⁵

It further reaffirms the rights to personhood of children in the street situation by addressing the dominant perception of children in the street situation as "non-persons and irritants" and confirms their status as citizens, persons, and individuals who are "capable of making a productive economic contribution".³⁵⁶ Children in the street situation are not only citizens but also have the right to basic human dignity (to which every citizen is entitled).

In conclusion, this case emphasises and reiterates the importance of the international human rights tribunals and that it extends to the most vulnerable groups of people. Litigation is as important and valued tool for successful social movement and has the potential, as Johnson rightly put it, to "trigger broad-based structural reform".³⁵⁷

Engaging in litigation to vindicate the rights of children serves as a last resort as these are the issues the State should address before they reach a litigation stage.

The following section explores the regional legal framework regarding the rights of children in Africa. The *African Charter* is explored as a mechanism to show the obligation of African States towards children in the street situation.

³⁵⁴ Ewelukwa 2006 *YHRDLJ* 86.

³⁵⁵ Ewelukwa 2006 *YHRDLJ* 86.

³⁵⁶ Ewelukwa 2006 *YHRDLJ* 86.

³⁵⁷ Johnson 1999 *Mich J Race & L* 207.

3.3 Regional legal framework applicable to children in the street situation

3.3.1 The African Charter on the Rights and Welfare of the Child, 1990

The *African Charter on the Rights and Welfare of the Child*, 1990 (the *African Charter*) was built on the *Declaration on the Rights and Welfare of the African Child*, 1979.³⁵⁸ It was developed in 1990 and is recognised as the main human rights instrument dealing with the rights of children in the African continent.³⁵⁹ For it to enter into force it required the ratification of 15 Member States of the Organisation of African Unity (OAU).³⁶⁰

Almost ten years passed before the required number of Member States ratified it, and the *African Charter* came into force in 1999.³⁶¹ The introduction of the *African Charter* was necessitated by the marginalisation and exclusion of some African States during the drafting of the *CRC*.³⁶² In drafting the *African Charter*, it was averred that specific and important social-cultural and economic realities of the African experience were missed or omitted by the *CRC*.³⁶³

It must however be noted that the *African Charter* does not oppose the *CRC*, as the two treaties are complementary and "provide the framework through which children and their welfare are increasingly discussed in Africa".³⁶⁴ South Africa ratified the *African Charter* in January 2000.

The Preamble of the *African Charter* recognises the protection and promotion of children's rights and defines a child in article 2 as "every human being below the age of 18 years".³⁶⁵ Similar to the *CRC*, the *African Charter* is based on the principles

³⁵⁸ *Declaration on the Rights and Welfare of the African Child* (1990); *African Charter on the Welfare and Rights of the Child* (1990) entry into force 29 November 1999 (hereinafter the *African Charter*).

³⁵⁹ Gose *The African Charter on the Rights and Welfare of the Child* 12-13.

³⁶⁰ *African Charter*: art XLVII: Signature, ratification or adherence.

³⁶¹ See Gose *The African Charter on the Rights and Welfare of the Child* 14.

³⁶² Olowu 2002 *Int'l Child Rts* 128.

³⁶³ Viljoen *The African Charter on the Rights and Welfare of the Child* 229.

³⁶⁴ Olowu 2002 *Int'l Child Rts* 128.

³⁶⁵ Art 2 of the *African Charter*.

of non-discrimination, the best interest of the child,³⁶⁶ the right to survival and development of the child, and participation.³⁶⁷

It is important to note the slight difference between the *African Charter* and the *CRC* in the formulation of the best interests principle. Article 4(1) of the *African Charter* provides that the best interests of the child is "the primary consideration" whilst according to article 3(1) of the *CRC* it is only "a primary consideration". Scholars argue that as the *African Charter* renders the best interests of the child "the primary consideration" it offers better protection to children.³⁶⁸ This means that the *African Charter* does not allow any other consideration to override the best interests of the child while the *CRC* does, to a certain extent, allow or permit other consideration to override the best interests of the child.

The *African Charter* does not expressly define or provide a provision for children in the street situation. However, the *African Charter* does call for children's legal protection as well as "particular care with regard to health, physical, mental, moral and social development".³⁶⁹ One can say that the latter provision speaks of all children including children in the street situation. The measures of protection regarding children shall include:

[E]ffective procedures for the establishment of special monitoring units to provide necessary support for the child as well as other forms of prevention and identification, reporting, investigation, treatment and follow-up of instances of child abuse and neglect.³⁷⁰

Article 11 of the *African Charter* and articles 28 and 29 of the *CRC* deal with the child's right to education and education-related issues.³⁷¹ Even though the *African Charter's* provisions on education are structured differently from those contained in

³⁶⁶ Art 3 of the *African Charter* provides that "[i]n all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration".

³⁶⁷ Art 3 of the *African Charter* provides for non-discrimination; art 4(1) provides for the best interests of the child; art 5 provides for survival and development; art 4(2) provide for participation and takes restrictive approach children capable of "communicating" own views.

³⁶⁸ Menzur 2008 *SAPR* 4; Sloth-Nielsen "The African Charter on the Rights of the Child" 432; Ekundayo 2015 *IJHSS* 149.

³⁶⁹ Preamble of the *African Charter*.

³⁷⁰ Art 16(1) of *African Charter*.

³⁷¹ See para 2.4.5 above.

the *CRC*, both treaties deal with, generally speaking, the same rights.³⁷² Articles 14(2)(c) and (d) of the *African Charter* obliges States to ensure the provision of adequate nutrition and safe drinking water and to combat diseases and malnutrition.³⁷³

These specific obligations are of great significance in the plight of children in the street situation (in African continents) as their existence on the streets exposes their vulnerability and their dire need to realise their socio-economic rights.³⁷⁴ Furthermore, article 19 of the *African Charter*³⁷⁵ provides for the child's enjoyment of parental care and protection, to which every child is entitled, and article 20 further provides the responsibility of parents in ensuring that care and protection.³⁷⁶

Belembaogo argues that "no child belongs to the street but to family".³⁷⁷ This means that where parents or families cannot afford the care and protection of the children, the State must intervene to ensure that children do not end up on the street. Therefore, it is paramount that all stakeholders should advocate for the ratification, popularisation, implementation, and reporting of the *African Charter*. The *African Charter* obliges the African States to:

[R]ecognize the rights, freedoms and duties enshrined in this Charter and shall undertake to take the necessary steps, in accordance with their Constitutional processes and with the provisions of the present Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter.³⁷⁸

³⁷² The *African Charter* recognises, in art 11(1), the right of every child to education generally; art 11(2) contains the aims and directive principles for education; art 11(3) enshrines the special aspects of this right; art 11(4) relates to the rights of parents to choose schools for their children other than State schools. See Gose *The African Charter on the Rights and Welfare of the Child* 113.

³⁷³ Art 14(2)(c)-(d) of the *African Charter*; See also Gose *The African Charter on the Rights and Welfare of the Child* 83.

³⁷⁴ See assertions above in relation to the plight of children in the street situation in Africa.

³⁷⁵ Art 19(1) of the *African Charter* provides that "every child shall be entitled to the enjoyment of parental care and protection and shall whenever, possible, have the right to reside with his or her parents [...]".

³⁷⁶ See arts 20(1)(a)-(c) of the *African Charter*.

³⁷⁷ CSO Forum on the African Charter 2011 <https://resourcecentre.savethechildren.net/document/fourth-cso-forum-african-charter-rights-and-welfare-child-acrwc/> at 5.

³⁷⁸ Art 1(1) of the *African Charter*.

The African Committee of Experts on the Rights and Welfare of the Child must interpret the provisions of the *African Charter* and provide principles to protect the rights of children.³⁷⁹ The Committee also oversees the implementation of the *African Charter* and receives reports from State Parties to which the Committee issues recommendations.³⁸⁰ I am of the view that there is a need for the Committee to develop a General Comment addressing children in the street situation, specifically in the African context.

The following section discusses South African legislation applicable to children in the street situation.

3.4 South African legal framework on children in the street situation

This section seeks to explore the South African legislation on children and its extent to the promotion and protection of the rights of all South African children, including children in the street situation. It investigates whether these laws adequately protect children in the street situation like other children.

The *CRC*, read with the *African Charter* provide that State Parties should take all legislative and other measures to recognise the rights enshrined in both these instruments.³⁸¹ In addition to the standard created by these instruments, several international agreements address the rights of children (including children in the street situation) and are binding on the Republic. Some of the provisions set out in the national legislation mirror those of international law and regional law, which demonstrate that domestic law must comply with these standards.

3.4.1 The Constitution of the Republic of South Africa, 1996 (the Constitution)

The democratic (post-apartheid) dispensation produced two Constitutions; the interim *Constitution* (1993) which brought a constitutional revolution, which came into effect in 1994, and its successor the 1996 *Constitution*.³⁸² Former President

³⁷⁹ Arts 32 and 42 of the *African Charter*.

³⁸⁰ See art 42 of the *African Charter*.

³⁸¹ Art 4 of the *CRC* and art 1 of the *African Charter*.

³⁸² Ackermann 2004 *NZL REV* 633.

Nelson Mandela signed the 1996 *Constitution* on 10 December and it came into effect on 4 February 1997.³⁸³ The *Constitution* is a transformative document aimed at redressing the social and economic inequalities of the past.³⁸⁴ "Transformative constitutionalism" is explained by Klare to mean

a long-term project of constitutional enactment, interpretation, and enforcement committed to transforming a country's political and social institution and power relationships in a democratic, participatory, and egalitarian direction.³⁸⁵

Ideally, transformative constitutionalism connotes an enterprise of including "large-scale social change through nonviolent political progress grounded in law".³⁸⁶ In this context, it is important to understand democratic "constitutionalism" as one of the basic principles expressly entrenched. "Constitutionalism" is the ideal that the government should derive its powers from a written Constitution, and that the scope and nature of those powers should be described in a Constitution.³⁸⁷ A Constitution has to strike a delicate balance in regard to these.

As a result, the government should have enough powers to effectively govern its citizens; however, such powers must simultaneously be limited to avoid abusing the law or the human rights of its citizens.³⁸⁸ The *Constitution* goes beyond just limiting the State's powers and this is where the notion of transformative constitutionalism originates from, as demonstrated above.

The *Constitution* places both positive and negative obligations on the State.³⁸⁹ The State must respect, promote, and fulfil fundamental rights.³⁹⁰ De Vos states that the Bill of Rights (Chapter 2 of the *Constitution*) is therefore not only a document that "preserve entrenched privileges", but also extends the enjoyment of those rights to

³⁸³ Republic of South Africa 2014 *Celebrating 20 years of the Constitution* <https://www.jsutice.gov.za/20yearsoftheConstitution> at 1.

³⁸⁴ De Vos 2001 *SAJHR* 258.

³⁸⁵ Klare 1998 *SAJHR* 150.

³⁸⁶ Klare 1998 *SAJHR* 150.

³⁸⁷ Davel (ed) *Introduction to Child Law in South Africa* 170.

³⁸⁸ Davel (ed) *Introduction to Child Law in South Africa* 170.

³⁸⁹ The State must ensure enjoyment of the rights in the *Constitution* and at the same time refrain from interfering with the enjoyment of such rights.

³⁹⁰ See s 7 of the *Constitution*.

everyone.³⁹¹ Moreover, the State should act positively to ensure the progressive realisation of all the rights.³⁹²

The Bill of Rights provides for the protection and promotion of the human rights of all the citizens in the Republic. It affirms the democratic values of human dignity, equality, and freedom, and applies to all legislation, and binds the legislature, executive, and judiciary, and all organs of State. Section 28(1) of the *Constitution* specifically deals with the rights of children and states:

28 (1) Every child has the right —

- (a) to a name and nationality from birth;
- (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
- (c) to basic nutrition, shelter, basic health care services and social services;
- (d) to be protected from maltreatment, neglect, abuse or degradation;
- (e) to be protected from exploitative labour practices;
- (f) not to be required or permitted to perform work or provide services that-
 - (i) are inappropriate for a person of that child's age; or
 - (ii) place at risk the child's well-being, education, physical or mental health or spiritual, or moral or social development;
- (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under section 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be –
 - (i) kept separately from detained persons over the age of 18 years and;
 - (ii) treated in a manner, and kept in conditions, that take account of the child's age;
- (h) to have a legal practitioner assigned to the child by the state, and at the state expense, in civil proceedings affecting the child, in substantial injustice would otherwise result; and
- (i) not to be used directly in armed conflict, and to be protected in times of armed conflict.

³⁹¹ De Vos 2001 *SAJHR* 261.

³⁹² De Vos 2001 *SAJHR* 261.

Section 28(2) of the *Constitution* further provides for the best interests of the child and states that it is of "paramount importance in every matter concerning the child".³⁹³ Furthermore, in terms of the *Constitution*, a child means a person under the age of 18 years.³⁹⁴ Noteworthy, international and regional law the *CRC* and the *African Charter* inspired the provision section 28.³⁹⁵

The rights of children are not only limited to the rights in section 28. They are also guaranteed other rights afforded to everyone such as the right to equality,³⁹⁶ human dignity,³⁹⁷ the right to life,³⁹⁸ freedom and security of the person,³⁹⁹ religion, belief and opinion,⁴⁰⁰ education,⁴⁰¹ and the rights afforded to everyone in section 35 (especially where children in the street situation conflict with the law).⁴⁰²

In *S v M*⁴⁰³ the Court emphasised that section 28 of the *Constitution* must be seen as responding in "an expansive way" to South Africa's international obligations as a State Party to the *CRC* and that the *CRC* has become the international standard against which to measure legislation and policies. Like the *CRC*, the rights under section 28(1) demonstrate both the socio-economic and civil rights of children in South Africa.⁴⁰⁴

Concerning the plight of children in the street situation in South Africa and how relevant jurisprudence calls for State intervention, sections 28(1)(b)-(c) are

³⁹³ Section 28(2) of the *Constitution*.

³⁹⁴ Section 28(3) of the *Constitution*.

³⁹⁵ Skelton "Constitutional Protection of Children's Rights" 374. See also *C v Gauteng Department of Health and Social Development* 2012 2 SA 208 (CC) (hereinafter the *C v Gauteng* case) para 33.

³⁹⁶ Section 9 of the *Constitution* provides that everyone is equal before the law, including children.

³⁹⁷ Section 10 of the *Constitution* provides that everyone has inherent dignity and the right to have their dignity respected and protected.

³⁹⁸ Section 11 provides that everyone has the right to life.

³⁹⁹ Section 12 of the *Constitution* provides that everyone has the right to freedom and security of the person.

⁴⁰⁰ Section 15 of the *Constitution* states that everyone has the right to freedom of conscience, religion, thought, belief and opinion.

⁴⁰¹ Section 29(1) of the *Constitution* provide that everyone has the right to education, see s 29(1)(a) which is the basic education is important for all children to get as education is an empowerment right.

⁴⁰² Section 35 of the *Constitution* provides for the rights of an arrested detained and accused persons, and this include juveniles or child offenders.

⁴⁰³ 2008 3 SA 232 (CC) para 16.

⁴⁰⁴ See para 3.2.5 above. See also s 28(1) of the *Constitution*.

particularly relevant. The right to family and parental care, according to the Constitutional Court, is indirectly protected via the right to dignity.⁴⁰⁵ This right is protected further by section 28(1)(b)⁴⁰⁶ and places a duty on parents and families of children to provide care and by implication further places an obligation on the State to support the institution of the family.⁴⁰⁷

In cases of children being separated from their parents, the courts must consider that separation will deprive the child of parental care, especially if such parent is the primary caregiver. On the other hand, this subsection provides that the State may in certain circumstances remove children from the care of parents when it is in the best interests of the child, and this may be in preventing abuse or neglect.⁴⁰⁸

However, in the case of *C v Gauteng*⁴⁰⁹ the Constitutional Court was of the view that the provisions that allow for the removal of children from the care of their parents are unconstitutional because of the absence of a procedure for automatic review of the decision of the removal of the child.⁴¹⁰

Once a child has been removed from his or her family environment, a duty is placed on the State to ensure that the environment in which the child is placed provides a similar standard of care to that which the child would have had in the family environment.⁴¹¹ Thus, the failure to place children in better conditions once removed from family care or any other care and placing them in poor conditions "betray[s] them and we teach them that neither the law nor State institution can be trusted to protect them".⁴¹²

In *Grootboom*, the issue before the Court was whether the Constitutional Court was obliged to consider the relationship between everyone's right to housing in terms of

⁴⁰⁵ *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) para 36.

⁴⁰⁶ Section 28(2)(b) of the *Constitution*. See para 3.3.1 above.

⁴⁰⁷ See *Grootboom* paras 75 – 76.

⁴⁰⁸ See s 151 and 152 of the *Children's Act*.

⁴⁰⁹ In this case ss 151 and 152 of the *Children's Act* were held to be unconstitutional and not in the best interests of the children who were removed from their parents on the street. See *C v Gauteng* para 23.

⁴¹⁰ *C v Gauteng* para 28.

⁴¹¹ See *Centre for Child Law v MEC for Education, Gauteng* 2008 232 (T) at 229B-C.

⁴¹² *Centre for Child Law v MEC for Education, Gauteng* 2008 1 SA 232 (T) at 229B-C.

section 26 of the *Constitution* and children's rights to shelter as provided for in section 28(1)(c) of the *Constitution*.⁴¹³ It was held by the court a quo that section 28(1)(c) imposes an obligation on the State to provide shelter for children in the very event that their parents are unable to.⁴¹⁴

The Constitutional Court, as a result, analysed the rights concerned by observing the overlap between sections 26 and 27 of the *Constitution*, which provides for the rights to access to socio-economic rights for everyone, and those in section 28(1)(c), which concerns the rights of children alone.⁴¹⁵ The Constitutional Court opined that viewing the right to housing and the right to shelter as distinct or separate rights, would render the constructed constitutional scheme for the progressive realisation of socio-economic rights worthless.⁴¹⁶

The Constitutional Court stated that section 28(1)(c) did not create "a direct enforceable" claim upon the State towards children in this instance.⁴¹⁷ The Constitutional Court concluded that section 28(1)(c) did not create rights that are separate and independent rights for children and their parents.⁴¹⁸ The Constitutional Court noted that section 28(1)(b) must be read together with section 28(1)(c); the former defining those responsible for giving care to children, whilst the latter list various aspects of the care entitlements.

The judgment, in this case, clearly suggests that the rights in section 28(1)(b) are primarily of horizontal application (that is between individuals), and the rights enumerated in section 28(1)(c) are regarded as primarily obligating parents.⁴¹⁹ On the other hand, the State incurs a positive duty to provide for the basic needs of children who do not receive the requisite care from their families or parents; the

⁴¹³ See *Grootboom* paras 13 and 15.

⁴¹⁴ See *Grootboom* para 15.

⁴¹⁵ *Grootboom* para 73.

⁴¹⁶ *Grootboom* para 74.

⁴¹⁷ *Grootboom* para 74.

⁴¹⁸ *Grootboom* para 74.

⁴¹⁹ *Grootboom* paras 75-76.

State must provide them with shelter, health care services, and other necessities as a matter of priority.⁴²⁰

Section 28 of the *Constitution* applies to all children. This section does not contain internal qualifiers like sections 26 and 27. Clearly, the drafters of section 28(1)(c) of the *Constitution* intended the subsection to impose a direct obligation on the State to ensure that children must have their socio-economic rights met immediately and that budgetary arguments cannot account for the State's failure.⁴²¹

It is submitted that, to a certain extent, children in the street situation do not enjoy the same benefits like other children, as their parents are unable to provide care and protection. It is thereby the duty of the State to ensure the protection of the rights of children in the street situation since their parents are unable to do so.

3.4.2 *The Children's Act 38 of 2005*

Children in the street situation in South Africa were first recognised in the *Child Care Act* 74 of 1983 (*Child Care Act*) as children in especially difficult circumstances.⁴²² The *Child Care Act* was not explicit in recognising what the rights of these children were as it did not address the question of "begging" or "street children" in its definition of a child in need of care and protection.⁴²³ The *Children's Act* 38 of 2005 (the *Children's Act*) later replaced the *Child Care Act*.

The *Children's Act* seeks to protect all children in the Republic, including children in the street situation from abuse, neglect, maltreatment, harmful labour, trafficking, and commercial and sexual exploitation.⁴²⁴ The *Children's Act* also aims to give effect to South Africa's legal obligation concerning children's rights, as outlined in the international instruments to which South Africa is a party.⁴²⁵ It mirrors the *CRC*, the

⁴²⁰ See Brand "The Proceduralisation of SA Socio-Economic Rights Jurisprudence" 48.

⁴²¹ See Ozah and Skelton "Legal perspectives: Children, families and the state" in *Children, Families and the State* at 58 – 59.

⁴²² Section 1 of the *Child Care Act* defines "children in especially difficult [...]" as "children in circumstances which may deny them their basic human needs, such as children living on the streets [...]"

⁴²³ Bosman-Sadie and Corrie *A Practical Approach to the Children's Act* 220.

⁴²⁴ See the preamble of the *Children's Act*.

⁴²⁵ The Preamble of the *Children's Act* 38 of 2005.

African Charter, and the *Constitution* in the sense that it defines a child as someone below the age of 18 years and emphasises that the best interest of the child is of paramount importance in all matters concerning them.⁴²⁶

The *Children's Act* has made some improvements since its implementation. The *Children's Act* provides the court with various options upon determination that a child requires care and protection.⁴²⁷ These options include the provision of child protection orders, treatment orders, and alternative care orders.⁴²⁸

Sections 142⁹ and 150(1)(c) of the *Children's Act* refers to children in the street situation and states that a child is in need of care and protection if "the child lives or works on the streets or begs for a living".⁴³⁰ Moreover, in terms of Chapter 9 of the *Act*⁴³¹, if a child and youth care worker (CYCW) comes into contact with a child in the street situation the CYCW should report the child to a social worker for investigation.⁴³² A designated social worker (DSW) then investigates whether the child is in need of care and protection and compiles a report.⁴³³

The DSW report must contain a detailed presentation of the information prescribed in Form 38.⁴³⁴ After the investigation, the DSW must share the findings with the provincial Department of Social Development (DSD) and the report must be submitted to the Children's Court.⁴³⁵ This report must provide or state the DSW's

⁴²⁶ See para 3.2.4 above.

⁴²⁷ Jamieson *Children's Rights to appropriate alternative care when removed from family environment* 192.

⁴²⁸ Jamieson *Children's Rights to appropriate alternative care when removed from family environment* 192.

⁴²⁹ Section 1 of the *Children's Act* provides that a street child means a child who -
(a) Because of abuse, neglect, poverty, community upheaval or any other reason has left his or her home, family or community and lives, begs or works on the streets; or
(b) Because of inadequate care, begs or works on the streets but returns home at night.

⁴³⁰ Section 150(1)(c) of the *Children's Act*.

⁴³¹ See Chapter 9 of the *Children's Act*, which explains in it's entirety the indemnification of a child in need of care and protection and steps to be taking thereof, at ss 150 – 160 of the *Act*.

⁴³² Jamieson *Children's Act Guide for Child and Youth Care Workers* 46.

⁴³³ Sections 150 and 155(2) of the *Children's Act*.

⁴³⁴ *Children's Act* 38 of 2005: *General Regulations Regarding Children* (Regulations), Regulations 55 http://www.saflii.org/za/legis/consol_reg/grrc2010324/.

⁴³⁵ Sections 155(3) and 155(4)(a) of the *Children's Act*.

conclusion as to whether the child is in need of care and protection, and the DSW must provide reasons for its conclusion.⁴³⁶ It is important to note that to apply the *Children's Act*, one must recognise that it is not always going to be in the best interests of the child to force him or her to remain at a child and youth care centre (CYCC) and this must be reflected.⁴³⁷ In chapter 2 of this paper it is argued that there are children in the street situation who live permanently on the street, and the street is the only home they've never known so it may be difficult placing them at the CYCC at first.⁴³⁸ As such they should not be forced but given the opportunity to attend the therapeutic programmes up until trust has been gained with the social workers or CYCW at those Centres.

To this extent, there are instances where the State will not remove children from the streets if such removal is not in their best interests of the child and where authorities abuse their powers.⁴³⁹ The best interests of the child is thus the determining factor in any decision relating to if, and when, a child should be removed and placed into temporary safe care. The factors taken into account include if the child is in need of not only care and protection but also immediate emergency protection, and if the child's life is in danger and the delay in obtaining a court order to remove the child will jeopardise his or her safety and wellbeing.⁴⁴⁰

Section 191(2) (k) of the *Children's Act* provides that a CYCC must offer therapeutic programme that are designed for the "reception and care of street children".⁴⁴¹ Notably, there seems to be no obligation placed on NGOs⁴⁴² to make available CYCCs that cater to children in need of care and protection. However, once a child is under the care of an NGO a legal obligation exists and the NGO must provide services to

⁴³⁶ Section 155(4)(b) of the *Children's Act*.

⁴³⁷ See para 2.3 above where I discuss the characteristics of children in the street situation.

⁴³⁸ See paras 2.2 and 2.3 above. A Child and Youth Care Centres are established in terms of section 191 of the *Children's Act*.

⁴³⁹ See *C v Gauteng* para 6, in this case the removal of the children was not in the best interest as they were not in need of care and protection but left unsupervised by their parent.

⁴⁴⁰ See ss 152(1)(a)-(c) of the *Children's Act*.

⁴⁴¹ Section 191(2)(k) of the *Children's Act*, however most of the CYCC operate under NGOs and some existing CYCC are not credited to offer therapeutic programmes to the children in the street situation.

⁴⁴² See para 4.2.5 below which discusses the roles of NGOs in South Africa in detail.

children as mandated by the *Act*.⁴⁴³ Although the government *must* provide and fund CYCC in terms of section 193 of the *Act*, it does not cover the full costs of providing the services and NGOs need to secure donors to cover the shortfall.⁴⁴⁴

In *C v Gauteng*, the constitutionality of sections 151 and 152 of the *Children's Act* was challenged in the Constitutional Court after children were removed from the care of their parent(s), when DSD assumed that the children were in the street situation in need of care and protection. Sections 151 and 152 of the *Children's Act* were found to be unconstitutional insofar as they did not provide for automatic judicial review of the removal process and thereby lacked a method for determining whether there was just cause for the removal.⁴⁴⁵

It was further argued that the removal of the children from the street was not in the best interests of the children in question.⁴⁴⁶ The Court took into account the fact that the removal of the children from their parents deprived the parents of their parental rights and responsibilities and the children's rights to care from their parents in terms of section 28(1)(b) of the *Constitution*.⁴⁴⁷ The Court also took into account that such removal did not allow the parents to challenge the removal and that no notice was given by the DSW.⁴⁴⁸

Section 4(2) of the *Children's Act* stipulates an important limit on the maximum extent of the government's obligation. Notably, the duty to act when considering other competing social and economic needs requires that departments must take "reasonable measures to the extent of their available resources to achieve the realisation of the objective of the rights".⁴⁴⁹

⁴⁴³ Budlender, Proudlock and Giese 2011 <https://static.pmg.org.za/docs/.110614digest.pdf> at 1 -3.

⁴⁴⁴ Budlender, Proudlock and Giese 2011 <https://static.pmg.org.za/docs/.110614digest.pdf> at 1 -3.

⁴⁴⁵ *C v Gauteng* paras 15 and 49.

⁴⁴⁶ *C v Gauteng* para 77.

⁴⁴⁷ *C v Gauteng* paras 17, 24, 33 and 64. See also art 9 of the *CRC* and art 19(1) of the *Africa Charter*. In this case the parents of the children who were removed from the streets based their case in part on art 9 of the *CRC* and art 19(1) of the *African Charter*, which provide that a child should not be separated from his or her parents unless necessary for the best interests of the child and subject to judicial review with an opportunity to participate in the proceedings.

⁴⁴⁸ *C v Gauteng* para 36.

⁴⁴⁹ Section 4(2) of the *Children's Act*. See also Schafer *Child Law in South Africa: Domestic and International perspectives* 66.

The *Children's Act* is an important piece of legislation regarding the rights of children in South Africa. The children's best interests must be always of paramount importance, especially vulnerable groups of children, such as children in the street situation. Within policy conceptualisation, child participation should also be given priority to best understand the views and needs of the children concerned. Children in the street situation remain the main responsibility of the State since their parents are unable to care for them. Although the *Children's Act* regulates the situation of children in the street situation, it is still unclear in terms of properly outlining strategies for children in the street situation.

3.4.3 *The South African Schools Act 84 of 1996*

The *South African Schools Act 84 of 1996* (*Schools Act*) aims to

redress the past imbalances in the provision of education, to progressively provide high-quality education to all learners, and by doing so lays a foundation for the development of citizens' talents and capabilities, and advances the democratic transformation of society to combat racism and sexism and all other forms of discrimination and intolerance.⁴⁵⁰

The *Schools Act* makes schooling compulsory for all children in the Republic between the ages of seven and fifteen or until they have completed grade nine and provides for learners to be exempted from payment of school fees under certain conditions.⁴⁵¹

The *Schools Act* makes it an offence if parents or guardians fail to ensure that their children are at school. Section 5 of the *Schools Act* further provides that if a learner who is subject to compulsory attendance in terms of subsection (1) is not enrolled at or fails to attend a school, the head of department (HOD) may (a) investigate the circumstances of the learner's absence from school; (b) take appropriate

⁴⁵⁰ See the Preamble of the *South African Schools Act 84 of 1996*.

⁴⁵¹ Section 3(1) of the *South African Schools Act*.

measures to remedy the situation; and (c) failing such a remedy, issue a written notice to the parent of the learner requiring compliance with subsection (1).⁴⁵²

The above precepts of section 5 presupposes that in relation to children in the street situation there must be measures taken by the schools and the Department of Education to understand why these children are not at school. The circumstances of children in the street situation in South Africa and their access to education have not improved over the decades.⁴⁵³

Hansen further argues that the special education policy that exists in South Africa may not be beneficial to children in the street situation since White Paper 6

does not offer a proper classification of street children mainly because street children may not have visible physical or mental disabilities.⁴⁵⁴

According to Dladla and Ogina this means that educational issues, such as "teacher preparedness, curriculum design, the legislative and policy framework, and assessment practices"⁴⁵⁵, have not been aligned with the educational needs of children in the street situation.⁴⁵⁶ The *Schools Act*, however, seems to suggest that it is optional for schools to intervene in relation to children who have never been to school, especially in relation to children in the street situation.⁴⁵⁷

3.4.4 *The Child Justice Act 75 of 2008*

The *Child Justice Act 75 of 2008 (CJA)* was enacted in 2008 and came into force in 2010. The *CJA* establish a criminal justice for children who are in conflict with the law and accused of committing offenses.⁴⁵⁸ Its objectives are to protect the rights of the child as provided in the *Constitution*, to promote the spirit of uBuntu in the justice system; provide special treatment to children; prevent children from being

⁴⁵² Section 5 of the *South African Schools Act*.

⁴⁵³ Dladla and Ogina 2018 *SAJE* 3.

⁴⁵⁴ Hansen *IJIE* 88. See also Department of Education 2001 Education White Paper 6: Special needs education Building an inclusive education and training system https://www.vvob.org/files/publicaties/rsa_education_white_paper_6.pdf.

⁴⁵⁵ Dladla and Ogina 2018 *SAJE* 3.

⁴⁵⁶ Dladla and Ogina 2018 *SAJE* 3.

⁴⁵⁷ See Admission Policy for Ordinary Public School, 2021.

⁴⁵⁸ The *Child Justice Act 75 of 2008*.

exposed to the adverse effects of criminal justice; and promote cooperation between government departments and NGOs.⁴⁵⁹ The *CJA* further provides that a child who has committed a crime should be guided and treated with respect.⁴⁶⁰

The *CJA* does not condone criminal acts, nor does it create lawlessness.⁴⁶¹ It rather places its focus on the best interests of the child with an exception of the child taking up responsibility and accountability.⁴⁶² Children in the street situation are often in conflict with the law and are often accused and arrested for offences they did not commit.⁴⁶³ Therefore, this Act aims at ensuring that their best interests are taken into account and that they are treated in a dignified manner within the child justice system, not subject to the harsh criminal system.⁴⁶⁴

Other notable or relevant legislation applicable to children in the street situation in this regards includes the *Criminal Procedure Act* 51 of 1977; the *Sexual Offences Act* 23 of 1957; the *Mental Care Act* 17 of 2002; and the *Prevention and Treatment of Drug Dependency Act* 20 of 1992.

3.4.5 National Policies

(a) *White Paper for Social Welfare, 1997*

In the post-apartheid dispensation, there was a need for the South African government to address the past imbalances that still exist. Extensive government papers were developed during 1995 and 1997, which includes the White Paper for Social Welfare, 1997, (1997 White Paper) aiming to restructure social welfare

⁴⁵⁹ Section 2 of the *CJA*. See also Sibanda *Vulnerable Children in South Africa: "Constitutional and Legislative Themes Applicable to the Protection of Vulnerable Children"* 82.

⁴⁶⁰ See also Skeleton and Tshehla *International instruments pertaining to child justice in South Africa* 52; Sloth-Nielson *SAJCJ* 302.

⁴⁶¹ Skeleton and Tshehla *International instruments pertaining to child justice in South Africa* 52

⁴⁶² Skeleton and Tshehla *International instruments pertaining to child justice in South Africa* 52.

⁴⁶³ Swart-Kruger and Ritcher 1997 *Social Science and Medicine* 957. See also Hills, Meyer-Weitz and Asante 2016 *Int J Qualitative Stud Health Wellbeing* 4.

⁴⁶⁴ The *CJA*, does not, however provide for a specific provision for children in the street situation but must be interpreted as though it does make provision for them.

throughout the country.⁴⁶⁵ The 1997 White Paper was the first overall policy under the 1996 *Constitution*.⁴⁶⁶ Its stated vision was to reform the apartheid era's residual social welfare system and to bring it in line with the new constitutional framework and binding international law.⁴⁶⁷

The 1997 White Paper commits the South African government to

giving the highest priority to the promotion of family life and the survival, protection and of all South African children.⁴⁶⁸

The 1997 White Paper points out that social welfare services should be formulated and delivered in a way that treats a child's situation as an outcome of their family and community situation.⁴⁶⁹ To realise children's rights to social services, it is necessary to take into account the developmental needs not only of vulnerable children themselves but also that of the relevant family and community.⁴⁷⁰

However, despite South Africa's long-standing commitment to the developmental approach, after many years of the 1997 White Paper's adoption, the majority of historically marginalised children remain vulnerable to poor outcomes and a high risk to violence, abuse, neglect, and exploitation.⁴⁷¹ Moreover, it is argued that the exclusion of marginalised children, such as children in the street situation, has served to "perpetuate poverty and inequality along historical fault-lines".⁴⁷² Thus,

⁴⁶⁵ According to the White Paper for Social Welfare, 1997 "social welfare" may be understood as an "integrated and comprehensive system of social services, facilities, programmes and social security to promote social development, social justice and the functioning of people".

⁴⁶⁶ White Paper for Social Welfare, 1997 https://www.gov.za/sites/default/files/gcis_document/201409/whitepaperonsocialwelfare0.pdf

⁴⁶⁷ Department of Social Development 2014 *Strategy and Guidelines for Children Living and Working in the Streets* 14.

⁴⁶⁸ White Paper for Social Welfare, 1997 https://www.gov.za/sites/default/files/gcis_document/201409/whitepaperonsocialwelfare0.pdf

⁴⁶⁹ White Paper for Social Welfare, 1997 https://www.gov.za/sites/default/files/gcis_document/201409/whitepaperonsocialwelfare0.pdf

⁴⁷⁰ Streak and Poggenpoel *Towards Social Welfare Services for all vulnerable children in South Africa: A review of policy development, budgeting and service delivery* 14.

⁴⁷¹ RSA Gov 2019 https://www.gov.za/sites/default/files/gcis_document/202102/national-child-care-and-protection-policy.pdf (hereinafter National Care and Protection Policy).

⁴⁷² National Care and Protection Policy 19.

the 2019 National Care and Protection Policy aims to avoid history repeating itself in the future.

(b) National Care and Protection Policy (2019)

The 2019 National Child Care and Protection Policy (2019 Policy) was developed and adopted to strengthen the national child care and protection system to fulfil South Africa's responsibilities to ensure the care and protection of children (especially the vulnerable) to survive and develop to their full potential and to be protected from violence, abuse, neglect, and exploitation.⁴⁷³ The 2019 Policy provides the conceptual, legal, and systematic foundations and mandate for collective action by responsible role-players to ensure the well-being of children in South Africa.⁴⁷⁴

The 2019 Policy further provides the overarching policy direction that guides national responses by government departments, branches, and levels.⁴⁷⁵ The 2019 Policy mandates and requires all the government agencies to review, and where necessary, revise their policies, laws, strategic and annual plans as well as their budgets and monetary and evaluation frameworks, to align with and give effect to their responsibility under this policy.⁴⁷⁶

The 2019 Policy recognises children in the street situation as a vulnerable group of children in need of care and protection and who have limited access to childcare and protection services.⁴⁷⁷ Despite its objective and purpose, the 2019 Policy missed the opportunity to separately address children in the street situation, as their needs and situation are distinct from other vulnerable groups of children.

According to Fou, policy is one of the legally prescribed governance instruments, which should be used by municipalities to realise their developmental mandate.⁴⁷⁸ In the context of this chapter, the policies must be adopted to give effect to the

⁴⁷³ National Care and Protection Policy 33.

⁴⁷⁴ National Care and Protection Policy 33.

⁴⁷⁵ National Care and Protection Policy 33.

⁴⁷⁶ National Care and Protection Policy 33.

⁴⁷⁷ National Care and Protection Policy 13.

⁴⁷⁸ Fuo 2014 *STELL LR* 188.

socio-economic rights of children in South Africa.⁴⁷⁹ Their role is to address, give recommendations and provide strategies to local municipalities and departments concerning the already existing issues regarding vulnerable children.

3.4.6 Analysis of South Africa's current legislation

The South African legal framework and obligations in relation to children's rights are in line with the international legal framework. The DSD in their framework states that the *CRC* rights that are particularly relevant to the framework for children in the street situation include protection from sexual and physical abuse (article 19); protection of children without families (article 20); health and health services (article 24); and the right to education (article 28).⁴⁸⁰

The primary obligation is placed on the parents of children.⁴⁸¹ However, concerning children in the street situation, the State bears both a positive and negative obligation.⁴⁸² The State has a positive obligation to realise the rights of children in the street situation as a matter of urgency and a negative obligation to ensure that there is no interference with the enjoyment of those rights by third parties or the State itself.⁴⁸³ Those specific obligations owed to children in the street situation in terms of legislation include the obligation to provide alternative care; implement protective measures that are in line with international standards; and provide inclusive access to education and accessible health care services.⁴⁸⁴ A further obligation is to submit periodic reports on children in the street situation concerning progress or developments.

Although, law provides for the socio-economic rights of children, specifically the *Constitution* in section 28(1), it is not clear who bears the obligation towards children in the street situation. Section 28(1)(b) provides that in the case where

⁴⁷⁹ Here referring the White Paper for Social Welfare 1997 and National Care and Protection Policy.
⁴⁸⁰ Department of Social Development 2014 *Strategy and Guidelines for Children Living and Working in the Streets* 10.

⁴⁸¹ See section 28(1)(b) of the *Constitution*, para 3.4.1 above and *Grootboom* para 74.

⁴⁸² See para 3.4.1 above.

⁴⁸³ See para 3.4.1 above.

⁴⁸⁴ See paras 3.4.1 and 3.4.2 above.

parents are unable to take care of their children, the State has an obligation to take care of those children and provide them with the services outlined in subsection 28(1)(c). However, these subsections do not further outline which group of children it includes, which leaves a gap in realising these particular rights towards children in the street situation.

Section 150(1)(c) of the *Children's Act* provides that children in the street situation are those in need of care and protection. The *Children's Act* sets out a procedure regarding the removal of the children and it becomes difficult when parents cannot afford to take care of their children. Unfortunately, this creates barriers regarding enforcement of this provision and it is a lengthy process.⁴⁸⁵

It is argued that the lack of enforcement of this provision is due to the inadequate budget in the implementation of the *Children's Act*; lack of knowledge regarding the legislation by people working with children in the street situation; unskilled workers; and pressure placed on NGOs by the DSD, which leads to a lack of success in interventions meant for these particular group of children.⁴⁸⁶ It is also a lengthy process for the Courts to intervene in this situation.⁴⁸⁷

In terms of the *Schools Act*, there seems to be no obligation on schoolteachers towards children in the street situation. Although they can take action, there is no specific provision that obliges them to do so.

There is currently no report by the DSD indicating that South Africa has incorporated the strategies and recommendations as developed by the Committee in 2017 in General Comment 21.⁴⁸⁸ Although the 2019 National Child Care and Protection Policy

⁴⁸⁵ See ss 151 and 152 of the *Children's Act*.

⁴⁸⁶ Pare 2003 *International Journal of Children's Rights* 13. See also Ward and Seager 2010 *Development Southern Africa* 59; Ray *et al Still on the street – still short of rights: Analysis of policy and programmes related to street involved children* 33; Loffel 2008 *Practice* 86; Skhosana 2020 *Social Work* 100.

⁴⁸⁷ Although the provision of section 191 of the *Children's Act* is often referred to most CYCC admit children at those Centres through Court orders.

⁴⁸⁸ There is no report clearly indicating whether consultation was carried out from South Africa with children in the street situation and whether the country is currently under an obligation to implement recommendations by the Committee. Which this reflect badly on South Africa and its response to children in the street situation.

provides guidelines for the State and stakeholders, its implementation must still be encouraged, to ensure that its mandate is also clearly extended to children in the street situation.

3.5 Conclusion

The rights of children have evolved throughout the years.⁴⁸⁹ International human rights and regional instruments have been adopted.⁴⁹⁰ These legal frameworks place an obligation on State Parties to protect and promote the rights of children in their countries.

The main purpose of this Chapter was to analyse whether these legal frameworks (to protect the rights of all children) pay attention to the most vulnerable groups of children in need of immediate care and protection, such as children in the street situation in South Africa.

International law places an obligation on the State to protect, promote, and fulfil the rights of children. It obligates the State to progressively realise the rights encapsulated in human rights treaties within available resources and if not possible to seek international cooperation. In the case of children in the most difficult circumstance, such as children in the street situation, the State is obligated to give the highest priority to this group of children. In fulfilling their international obligation, States are periodically monitored by the Committee to ensure that they comply with the standards set forth and whether there is progress.

It is submitted that South Africa has made fair progress in ensuring the best interests and protection of children in the street situation. It has introduced mechanisms (legislative and otherwise) that are in line with international standards, which seeks to address the issues of this vulnerable group of children. The introduction of the 2019 National Child Care and Protection is a step in the right direction in offering guidance to the government departments and stakeholders. The issue, however, is the enforcement of such a mechanism. The existing

⁴⁸⁹ See paras 3.2.1, 3.2.2, 3.2.3, 3.2.4, 3.2.5 and 3.4 above.

⁴⁹⁰ See paras 3.2 and 3.3 above.

legislation itself is not clear as to who is responsible for children in the street situation.

In conclusion, this chapter demonstrates that despite the overall positive legislative reform, there are still gaps in the legal framework regarding the realisation of the rights of children in the street situation. These gaps relate to participation and the lack of enforcement. It also relates to gaps in the division of responsibility between the State and parents, when the child is not in the care of parents.

The existing policy misses a mark in addressing the rights of children in the street situation distinct from other vulnerable groups of children as outlined in the National Care and Protection Policy 2019. Regrettably, there also exists no proper legislative guidelines. These gaps ultimately create challenges when it comes to the implementation of policy and legislation.

The next chapter discusses various recommendations.

4 RECOMMENDATIONS AND INTERVENTIONS

4.1 Introduction

Although South Africa has adhered to the international standards in its attempt to incorporate international law within municipal law and recognising children's rights in the *Constitution*, there are still some suggested recommendations to assist in the effectiveness of the law — especially regarding the plight of children in the street situation. The South African government has an international and national obligation to guarantee every child equal protection and enjoyment of the rights applicable to them, without any unjustified limitation.

Chapters 2 and 3 outline the gaps and challenges regarding the rights of children in the street situation. This chapter suggests possible recommendations, which the State and other stakeholders working with children in the street situation can apply to adequately address this plight.

4.2 Recommendations

The following section addresses the gaps and challenges through possible recommendations.

4.2.1 Legislative recommendations

It is evident from the discussion of chapter 3 that certain provisions of the current legislation lack clarity regarding children in the street situation. These specific provisions are sections 150, 151, and 152 of the *Children's Act* and section 5 of the *Schools Act*. For this reason, I make the following recommendations:

Subsection 150(1)(c) should be clearly read with subsection 150(3) of the *Children's Act*, an additional paragraph should be inserted in subsection (3) and interpreted in a way that makes it clear whose responsibility children in the street situation are. In the context of this study children in the street situation are the obligation as they are not in their family environment. So that must be made clear in the recommended subsection (3).

Section 150 of the *Children's Act* should be reviewed and amended in its entirety. I suggest inserting a subsection that outlines the responsibilities owed to children in need of care and protection to make it easier when sections 151 and 152 of the *Children's Act* are referred to. This can be achieved by providing a clear guideline for social workers or police officials to determine whether a child is in need of care and protection.⁴⁹¹ This guideline must be informed by child participation and taking their views into consideration so that the guideline will favour them.

Consequently, sections 151 and 152 of the *Children's Act* should be further expanded by inserting subsections that are clear regarding the manner in which the procedure of removing children in the street situation must be followed, so that such removal is in their best interests.⁴⁹² The said provision must then be read with section 191(2)(k) to ensure that these children are correctly placed once removed from the street.

The *Schools Act* should contain a section that obliges both the government, HODs, and schools to intervene in the case of children in the street situation. Children in the street situation are a vulnerable group, thus an obligation should be placed on schools and other role players to intervene. This intervention would entail admission and placement of children in the street situation in schools where they are afforded both educational and therapeutic support.⁴⁹³

Guidelines that accommodate children in the street situation in a school setting are necessary to enable them to benefit from education.⁴⁹⁴ It is for this reason that placing an obligation on teachers and schools may be necessary.

⁴⁹¹ Section 155 of the *Children's Act* does provide for the guideline, however, it should be noted the needs and situation children in the street situation are distinct from other children, so there should be a guideline that specifically addresses children in the street situation so that these children are placed at the correct alternative care once removed from family environment or the streets.

⁴⁹² See *C v Gauteng*, in this case ss 151 and 151 of the *Children's Act* were held to be unconstitutional and not in the best interests of the children who were removed from their parents on the street.

⁴⁹³ For children who have never been in school before and have no desire to do so, once placed at the CYCC it is important that the Department offer the children with vocational training where they can develop a skill that once they reach a 18 or 21 they are able to take care of themselves.

⁴⁹⁴ See Dladla and Ogina 2018 *SAJE* 7.

The Department of Education should cooperate with schools, communities, parents, and NGOs by outlining intervention strategies to address the problem of children in the street situation.⁴⁹⁵ This can be done through educational policies that are non-discriminatory and encourage all children to attend school, thereby making education accessible to all children, especially in the rural areas, and address the core reasons why children are not in schools and end up on the streets. Moreover, to identify and implement efficient and effective strategies for children in the street situation, it is necessary to analyse the reasons or contributing factors to ending up on the street or engaging in street life, and to what extent their rights are being met in South Africa.⁴⁹⁶

The Department of Education should incorporate participation, from children in the street situation, schools, educators, communities, and other stakeholders. This could have a positive effect in outlining guidelines and policy conceptualisation.

4.2.2 Causal factors and alternative care

As pointed out in Chapter 2, poverty due to unemployment, abuse and neglect, familial breakdown, and the lack of education are some of the major contributors to the existence of children in the street situation in South Africa. As a result, there is a need to improve the standard of living for families through the progressive realisation of socio-economic rights, which is in line with international and national standards.⁴⁹⁷ This may be achieved by the State fulfilling its obligation in assisting parents and families by offering employment to parents of children who are at risk of ending up on the street and social grants.

⁴⁹⁵ Although previous studies conducted in South Africa, regarding children in the street situation have made recommendation similar to this, in the current years there has not been an improvement by the departments in fulfilling their obligation. Therefore, this particular recommendation is to emphasise the importance of intervention by the department.

⁴⁹⁶ In the case of *Juma Masjid Primary School v Essay* the Court reasoned that “[u]nlike some of the other socio-economic rights, [the right to basic education] is immediately realisable”. Therefore, any valid limitation of this right must be “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom” at para 37.

⁴⁹⁷ See paras 3.2 and 3.4 above. The current reports shows that there is a drop in the standard of living in South Africa, especially now given the current Covid-19 pandemic. See *BusinessTech 2021* <https://www.google.co.za/amp/s/businessstech.co.za/news/finance/459244/expect-a-big-drop-in-living-standard-in-south-africa-worldbank/amp>.

Social workers should be involved in cases of abuse, neglect, and familial breakdown by removing children from their homes when it is believed that their safety is in jeopardy and placing them in alternative care in accordance with the *Children's Act*⁴⁹⁸ and UN Guidelines for Alternative Care of Children. On the other hand, social workers and other family professionals can intervene and offer counselling regarding the issues of familial breakdown to restore the relationships between the parents and children to prevent children from falling victim to the street. The complex psychological background and circumstances of children in the street situation necessitate a multifaceted intervention through programmes.⁴⁹⁹ These programmes include therapeutic programmes offered at CYCCs.

If a child is in alternative care, the government has the primary responsibility to provide for the needs of the child.⁵⁰⁰ According to Justice Murphy the government has an unqualified obligation to provide for their basic needs as well as psychological and therapeutic needs of children in alternative care.⁵⁰¹ The UN Committee on the Rights of the Child must regularly advise South Africa when dealing with this plight, especially how it can improve in its obligation to provide alternative care to children who have no parents or have no familial connection, such as children in the street situation.

The government should build more CYCCs that are exclusively for children in the street situation. This will ensure that the intervention and rehabilitation processes favours these children and are successful to reintegrate these children back into the community. On the other hand, there should be a regular follow-up once the child has left the CYCC, which will help determine whether the rehabilitation was a success and that the child has reintegrated back into the community.

⁴⁹⁸ See s 191 of the *Children's Act*.

⁴⁹⁹ Lefeh *South African Government Responses to the Plight of Street Children: An Analysis of Policy Development and Implementation in Johannesburg* 26.

⁵⁰⁰ Jamieson *Children's Rights to appropriate alternative care when removed from family environment* 214.

⁵⁰¹ *Centre for Child Law v Minister for Education Gauteng* 2008 1 SA 223 9(T) paras 227-229.

4.2.3 Possible terminology recommendation

In Chapter 2, it is argued that the term "street children" should be changed to a more inclusive and less stigmatising term. For this reason, I suggest that the term "children in the street situation" should be used to define these children. The term will ensure that all the children who might find themselves in the street situation are included in policy conceptualisation, without being excluded once the government set forth a policy that speaks to the realities of children in the street situation.

It is essential that the realities and lives of children on the street must be characterised with the involvement of children who experience them, rather than conducting it on their behalf. Such involvement or participation is important and influences policies and legislation aimed at realising the protection and promotion of children's rights.

4.2.4 Recommendations to government

The government has not done enough to fulfil its international and national obligation to adequately address the plight of children in the street situation. The following recommendations are proposed:

The South African government should improve existing laws or policies to include the design and implementation of municipal policies, with adequate budgets aimed at ensuring positive law enforcement, coordinating referrals, and providing support for specialised interventions for children in the street situation.

These policies must be firmly related to the CPS⁵⁰² and be based on local NGOs' participation, which includes these children. The government must implement the 2019 National Child Care and Protection Policy, which must be monitored regularly.⁵⁰³ It is recommended that South Africa incorporate strategies and

⁵⁰² Child Protection Services (CPS) in South Africa provide well-coordinated, equal, comprehensive and sustainable responses to children's protection needs.

⁵⁰³ See National Care and Protection Policy 2019.

recommendations set forth by the General Committee on General Comment No 21, which provides that:

States may need to develop nationally relevant policy and legal definitions of such children on the basis of participatory research, in contexts where this is necessary to facilitate interventions by legally mandated professionals and services. However, the process of developing legal definitions should not delay taking action to address rights violations.⁵⁰⁴

As discussed in Chapter 3, children in the street situation experience several limitations regarding their living conditions, education, healthcare services, and age-appropriate activities (given the nature of the streets). In response, the government must be inclined to address their problems through developing strategies and action plans that include concrete goals and interventions and by cooperating with NGOs in service provisions.⁵⁰⁵

There must be an establishment of a national monitoring mechanism for the situation of these children relating to education, healthcare, and social services. There is a need to then formulate implementation methods and ensure compatibility with the South African child law and international and regional standards. Through these implementations, article 12 of the *CRC* must be respected (hence, children must be involved in all stages of the development and implementation of programmes). This includes the design and situation analysis process that is intended for programme and policy conceptualisation in South Africa.

The government should then put in place intervention and prevention programmes that address the plight of children in the street situation with the help of NGOs and professional workers in communities.⁵⁰⁶ This must be done by way of the

⁵⁰⁴ General Comment No 21 para 16.

⁵⁰⁵ Ward and Seager 2010 *Development Southern Africa*. See also Skosana 2020 *Social Work* 100. Although strategies have been proposed in 2016 by the Department of Social Development, regarding children in the street situation there are no reports that indicate any improvements since those strategies were proposed.

⁵⁰⁶ NGOs employ a wide range of programmes to address the rights and needs of children in the street situation such as advocacy, preventive programmes, institutionalised programmes which involve residential rehabilitation programmes and full-care residential homes as well as street based programmes or outreach programmes which involves inter alia feeding programmes, medical social welfare services, family reunification, drop-in centres or night shelter and outreach programmes; see Ward and Seager 2010 *Development Southern Africa* 97.

government addressing stigmatisation and discrimination of children in the street situation through public platforms, emphasising the experiences and rights of these children.⁵⁰⁷ Therefore, the implementation of programmes and policies must favour and benefit all children, including those that are at risk of ending up on the street or are already living and working on the streets.

4.2.5 Recommendations for NGOs as renders of social welfare services to children in the street situation

NGOs in South Africa are the most effective in providing social welfare services to children in the street situation and are thus significant in addressing this plight.⁵⁰⁸ They have done all they can to address this plight but have often failed to reach their goal in providing services to these children due to underfunding and lack of involvement by the government.⁵⁰⁹ However, the NGOs should continue working harder and use the media and establish contacts with government agencies to enforce the observance of children's rights.

In essence, the NGOs must raise institutional and public awareness of children in the street situation, their needs, and risks to which they are exposed on the streets to eliminate the maltreatment, discrimination, and attitudes of exclusion towards them.⁵¹⁰ Great attention must be paid to early intervention and prevention programmes as outlined in the *Children's Act* to prevent children from ending up on the street.⁵¹¹

⁵⁰⁷ Ward and Seager *Development Southern Africa* 96.

⁵⁰⁸ Patel and Wilson 2003 *Social Work Practitioner-Researcher* 222; South Africa's NGO Pulse reports that South Africa has over 100 000 registered non-profit organisations as well as an estimated 50000 unregistered ones; Stuart 2013 <http://www.ngopulse.org/article/south-african-nonprofit-sector-struggling-survive-needing-thrive>.

⁵⁰⁹ Grundling and Grundling 2005 *Human Relations* 177. See also Loffel 2008 *Practice* 86.

⁵¹⁰ See paras 2.3 and 3.2.5 above regarding the dangers and violation of the rights of children in the street violation.

⁵¹¹ The *Children's Act* describes the kinds of activities on which the prevention and early intervention should focus, and these includes the following: strengthening family relationships Developing parental skills and caregiver's ability to protect the well-being and best interests of their children; promoting healthy relationships within families; providing psychological, rehabilitation and therapeutic programmes for children; preventing family problems from recurring so that they do not harm children or interfere with their development; stopping the

Furthermore, NGOs (through the assistance of the DSD regarding funds) must attempt to implement street programmes to eliminate the main causal factors contributing to children in the street situation. It is important to assess whether the people working with these children are qualified and experienced, as the successful implementation of any programme regarding children in the street situation requires trained and developed state and non-state actors providing the required service delivery.

There must be formal training offered by the government and NGOs to better prepare the professional workers for the task at hand. The training must be extended to South African Police Services (SAPS) members who normally work with children in the street situation and often respond violently towards them.⁵¹²

It is also recommended that through interventions and reunification processes, the staff (that is social workers and other relevant parties) need to work with each individual child to better understand their life experience and reach a clear agreement and plan on what they are together trying to achieve. This will help to ensure that interventions contain a clear development objective rather than simply supporting these children to continue living on the streets. Everything must be achieved in the best interests of these children as pointed out in the *Constitution*, *CRC*, and the *African Charter*.⁵¹³

However, cooperation between the government and NGOs must persist. NGOs cannot be burdened with all the pressures of performing the government's duties. Therefore, there is a need for the government's active involvement and cooperation to meet the needs of children in the street situation.

familial problems from getting worse that children need to be removed from the family and placed in foster care and CYCCs. See ss 144(1)(a)-(f) of the *Children's Act*.

⁵¹² See Hills, Meyer-Weitz and Asante 2016 *Int J Qualitative Stud Health Wellbeing* 5-6.

⁵¹³ See s 28(2) of the *Constitution*; art 3(1) of the *CRC*; and art 4(1) of the *African Charter*.

4.2.6 Data collection

From Chapter 1 of this dissertation it is evident that there are no clear statistics regarding the number of children on the street in South Africa. For that reason, I recommend that the government must develop systematic methods to collect data and share information about children in the street situation. The aim of this must be to develop a comprehensive and coordinated system of data collection. This should include detailed data regarding children in the street situation to be able to identify discrimination in the realisation of children's rights as recommended by the Committee on the Rights of the Child.⁵¹⁴

As such, this system must be able to identify the children in the street situation by circumstances, connections, characteristics, and experiences to design strategies, policies, and programmes. It must detect obstacles and recognise progress in their implementation through gathering evidence by way of qualitative and quantitative data and must involve children as well as NGOs and other stakeholders across South Africa.⁵¹⁵ This will help in better addressing the plight of children in the street situation in South Africa and for the government to develop better solutions to decrease the number of children on the street in the future.

4.3 Conclusion

The purpose of this chapter is to provide recommendations regarding the gaps and challenges concerning the realisation of the rights of children in the street situation. There is still much to be done. A positive relationship between the State and stakeholders are required for the proper implementation and review of existing laws. As a result, the suggested recommendations are thus applicable to the State, NGOs, and other relevant stakeholders working with children in the street situation.

⁵¹⁴ See General Comment No 21.

⁵¹⁵ See para 4.2.5 above.

5 CONCLUSION

As alluded throughout this dissertation the main research question is "what are the obligations of the state regarding the rights of street children". In Chapter 1, it is established that globally, and in South Africa, a large number of children find themselves in the street situation. These children are a vulnerable group as they face marginalisation globally and in South Africa.⁵¹⁶

Chapter 2 looked at the terminology concerning "street children". It is evident that there is no universal definition of who street children are. The term "children in the street situation" is preferred as it is broad, less stigmatising, and includes all categories of children.⁵¹⁷ In this chapter, the characteristics of street children are discussed and it is evident that in South Africa there are predominantly more males than females and the majority of these children are black, ranging from the ages of 7 to 18 years old.⁵¹⁸ The factors that contribute towards children finding themselves on the street include poverty, unemployment, neglect, and abuse.

In chapter 3, I discussed the legal framework on an international, regional, and national level pertaining to children in the street situation. The chapter articulates the obligations of the State and whether the State adequately protects the rights of these children through its legal obligations. It is clear that international law sets forth certain obligations that State Parties, including South Africa, must fulfil.

The international law obligations on states concerning street children include protection from harm caused by State-led (or third party) violence; providing material assistance and support programmes directly linked to children; access to education and healthcare services; and making available all preventive measures and have in place measures to respond to the maltreatment.⁵¹⁹

⁵¹⁶ See para 1.1 above.

⁵¹⁷ See para 2.2 above.

⁵¹⁸ See para 2.3 above.

⁵¹⁹ See para 3.2.8 above.

The obligation of the State in terms of municipal law is to protect, promote, and fulfil the rights of all children.⁵²⁰ It also includes an obligation to incorporate international law into municipal law to realise their rights under international standards. However, it is apparent that certain existing provisions of the legislation are not as clear regarding the rights of children in the street situation.⁵²¹ This leads to gaps that relate to enforcement, participation, policy conceptualisation, and division of responsibilities. Challenges relate to proper implementation when it comes to the realisation and promotion of the rights of these children.

Regional law, specifically the *African Charter* is the main instrument regulating the rights of children in the African context. It is explored to indicate its relationship with the *CRC*. The *African Charter* mirrors the *CRC* and is based on the four cardinal principles of the *CRC*. Disappointingly, like, the *CRC*, the *African Charter* does not address the rights of children in the street situation. Although its provisions are also applicable to children in the street situation, there is still a need for a General Comment addressing this plight in Africa.

National legislation, the *Constitution*, and the *Children's Act* outline the rights of children in South Africa, and their provisions mirror the *CRC* and the *African Charter*. The rights of children in the street situation stem from the provisions contained in these pieces of legislation. Specifically, section 150 of the *Children's Act* recognises that these children are in need of care and protection. However, the *Children's Act* itself does not clearly outline the needs of children in the street situation.⁵²²

In light of the above, it is clear that despite the abundance of legislation and policies in South Africa, the government still fail to adequately address children in the street situation. However, the problem is not rooted in the existing law but rather in the lack of enforcement and properly incorporating them within municipal law.

⁵²⁰ See paras 3.4 and 3.4.7 above.

⁵²¹ See paras 3.4.2 and 3.4.7 above.

⁵²² See for example para 4.2.1 above where I make recommendations regarding how this section may be improved to be more specific in relation to the rights of children in the street situation.

In Chapter 4 recommendations are made.⁵²³ The recommendations include legislative measures; measures to be put in place to address the causes that lead children to the street; and the role of the South African government in addressing the plight of children in the street situation. Possible solutions include recommendations to NGOs as they are important in rendering social welfare services to children in need of care and protection. Data collection is outlined to show its importance in determining the number of children in the street situation in South Africa.

Notwithstanding the existing challenges concerning children in the street situation, it is not too late to make changes to curb this plight. These serve as further recommendations, which the State and other stakeholders may use to address the issue of children in the street situation in South Africa.

The government should review the legislation and enforce it in a manner that addresses the current state of events in the context of the COVID-19 pandemic. The government should, in turn, take into account the recommendations and strategies already made by the Committee on General Comment 21⁵²⁴ and incorporate them when reviewing the legislation, which will address the needs of children in the street situation.

The government should introduce a national policy, which strictly addresses the needs of children in the street situation, and outline whose responsibility children in the street situation are. This policy should outline the responsibilities of all the parties accountable for children in the street situation. This will show a positive response by South Africa in addressing this plight and the seriousness of curbing it.

For these legislation and policies to be implemented, there is a need to encourage child participation and take their views into account when drafting policies that affect them. It is not a good reflection on policy makers to make decisions on behalf of these children if they are excluded from the process of policy conceptualisation.

⁵²³ See para 4.2 above.

⁵²⁴ General Comment No 21 is a General Comment specifically for children in the street situation, which, suggest recommendations and strategies for State Parties.

Since the factors and causes pushing children to the street might influence legislation and policies, including these children in the discussion is important to ensure that their needs are met and their rights protected. This will make them feel empowered as they are the ones who are directly affected.

The social workers and other parties working with children in the street situation both on the street and once in alternative care (CYCC) must be trained and made aware of existing legislation and policy. The DSD or the relevant departments must ensure that the parties working with these children are not underpaid.

In addition, the government must build a positive relationship with the NGOs and other relevant stakeholders. This can be achieved through direct involvement and the provision of adequate budgets to meet the needs of children once under the care of NGOs, via the implementation of the *Children's Act*.

The police officials who normally work with cases involving children in the street situation should be trained regarding the procedure of dealing with these children in terms of the *Children's Act*⁵²⁵ and *CJA*. This will help to prevent the officials from abusing their powers and violating the rights of these children.

There should be clear data collection conducted by the government and NGOs regarding the numbers of children in the street situation. This will assist in producing clear statistics in South Africa and introduce new methods of curbing this plight.

Lastly, since this study illustrates that there is a stigma around these children and once on the street, they are victims of discrimination and violence. The government must introduce educational seminars on children in the street situation so that society and stakeholders understand these children, their needs, and their rights.

5.1 Possible future questions

These are some future possible questions that are worth researching:

⁵²⁵ See for example ss 150, 151 and 152.

What is the importance of child participation during policy conceptualisation in relation to children in the street situation?

Are the African States doing enough in addressing the plight of children in the street situation in Africa?

To what extent have the needs and rights of children in the street situation been addressed during the Covid-19 pandemic and whose responsibility is it?

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